IN THE

Supreme Court of the United States

OCTOBER TERM - 1971

No. 71-5445

GERALD SHADWICK,
Appellant,

v.

CITY OF TAMPA,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

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GERALD SHADWICK,
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CITY OF TAMPA,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the final judgment of the Supreme Court of Florida on the following grounds:

I. The appeal does not present a substantial federal question.

II. The federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

III. The Court should not set the case for argument because the decision below is so obviously correct as to warrant no further review.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported in 250 So.2d 4 affirming the opinion of the District Court of Appeal, Second District, reported in 237 So.2d 231. Copies of these opinions are attached hereto, by Appendices, respectively, in App. A, *infra*, pp. A 1-3 and in App. A, *infra*, pp. A 4-8.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257(2).

QUESTIONS PRESENTED

1. Whether special and general laws pertaining to duties of clerks of the municipal court to issue arrest warrants are constitutional delegation of a quasi-judicial power, and impliedly therewith, the power to determine probable cause.

2. Whether the clerk or deputy clerks of the municipal court of the City of Tampa are neutral and detached "magistrates" unconnected with law enforcement, for the purpose of issuing arrest warrants within the requirements of the United States Constitution, Fourth and Fourteenth Amendments, and Fla. Const. Art. I, Sec. 12 (1968), by virtue of the Florida Statutes fixing their powers and duties to issue arrest warrants.

STATUTES INVOLVED

The statutes involved are *Fla. Stat.* (1967) Section 168.04, F.S.A., and Sections 495 and 160.1 of the Charter of the City of Tampa (Special Laws of Florida incorporated in the Charter of the City of Tampa). They are printed in App. B, *infra*, p. A 9.

STATEMENT

This is an appeal from a final judgment rendered by the Supreme Court of Florida, reported as *Shadwick v. City of Tampa*, 250 So.2d 4 (1971) (App. A, pp. A 1-3) where the question of the validity of state statutes (App. B, p. A 9) as being repugnant to the Fourth and Fourteenth Amendments, United States Constitution, were drawn into question, and the decision was in favor of their validity. The statutes involved vest in the city clerks the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest.

In this Motion to Dismiss or Affirm pursuant to Rule 16, Supreme Court Rules, the parties will be referred to as they stand in this Court, Appellant and Appellee, respectively.

The following symbols will be used:

"App."	for Appendix of Appellee.
"JS."	for Appellant's Jurisdictional Statement.
"JSA."	for Appellant's Appendix to Jurisdictional Statement.
"R."	for original Record-on-Appeal to Supreme Court of Florida.

This cause was commenced when the Appellant was arrested and charged with "careless driving while drinking" on March 6, 1969, in the City of Tampa, Hillsborough County, Florida, in violation of Section 36-89(b), City of Tampa Code (R. 4-5; App. C, pp. A 10-11). The Appellant filed his Motion to Quash Warrant on March 13, 1969, in the Municipal Court of the City of Tampa (R. 6-7; App. C, pp. A 12-13) and subsequently, on April 18, 1969, an Order was entered denying said Motion (R. 8; App. C, p. A 14). Appellant on April 23, 1969, filed Petition for Writ of Certiorari in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, (R. 1-3; App. C, pp. A 15-18) and on July 23, 1969, the Honorable Neil C. McMullen, Circuit Judge, entered an Order Denying Writ of Certiorari. (R. 9; App. C, p. A 18).

From this Order, Appellant on August 21, 1969, timely filed his Notice of Appeal to the Supreme Court of Florida which found the matter to be within the jurisdiction of the District Court of Appeal, Second District, and transferred the case there.

Subsequently, on assignments of error (R. 11; App. C, p. A 19), and after oral argument, the Second District Court of Appeals filed its Opinion on June 24, 1970, holding the challenged statutes valid constitutionally. (App. A, pp. A 4-8).

At this juncture, a Petition for Rehearing was filed (R. 62-65; App. C, pp. A 20-23) belatedly raising for the first and only time the issue of the insufficiency of the warrant.

On appeal to the Supreme Court of Florida, the Appellant did not brief or argue the sufficiency of the war-

rant (App. D, pp. A 24- 55) nor did the Appellee. (App. D, pp. A 56-76).

From a final judgment rendered by the highest court of this state holding the involved statutes valid (App. A, pp. A 1-3), which vest in the city clerk the power to issue arrest warrants, and impliedly therewith the power to determine the question of probable cause for the arrest, the Appellant timely filed his Notice of Appeal to this Court. (JSA. 1-2).

ARGUMENT I.

The appeal does not present a substantial federal question.

Appellant misstates the question presented to the lower court by adding in the Jurisdictional Statement to this Court matters never presented to the lower court for its consideration such as "conclusionary terms" of the affidavit (JS. 3; JSA. 10), "sufficient information to support an independent judgment that probable cause exists for such warrants" (JS. 3), the district court "... held that neither the State nor Federal Constitution require the determination of probable cause required for the issuance of arrest warrants be made by a judicial officer,. . ." (JS. 4), that "This appeal presents to this Court for the first time the question of whether the independent judgment that probable cause exists . . . may be made by a non-judicial officer. . ." (JS. 5) (which has no bearing upon the validity of the state statutes involved and fails to distinguish a clerk's obvious quasi-judicial duties imposed by statutes), and that the conclusionary statement in the affidavit is a "rubber stamp" on a printed form thus rendering the individuals rights under the Fourth and Fourteenth Amendments false or artificial (JS. 8-9). This is a different "rubber stamp" argument mentioned in passing by Appellant at the intermediate state court level (App. A, p. A 8), never raised again in the Supreme Court of Florida (App. A, pp. A 1-3) and unsupported factually by Appellant with anything other than the bare affidavit and warrant. (R. 4-5; App. C, pp. A 10-11).

What other factual information the clerk may have had for issuing the warrant is left to speculation by Appellant unlike the facts in *Whiteley* v. *Warden,* 401 U.S.

560 (1971) upon which Appellant relies heavily. Appellant in arguing these issues as a substantial federal question has produced in support thereof a factually silent record.

Appellant would have only a judge or strictly judicial officer empowered to determine probable cause. Such a stringent requirement would inhibit new or different procedures to meet the needs of crowded metropolitan courts and overburden the very small village which may only have a mayor, a clerk and a marshal to administer justice. The Court, in this case, must recognize the broad spectrum of needs of the people in relationship to where they live. Territorial uniformity of state laws governing criminal procedure is not a constitutional prerequisite. *United States* v. *Commissioners of Correction, City of New York,* 316 F. Supp. 556, 564-566 (D.C. S.D.N.Y. 1970).

In support of a substantial federal question, Appellant cites a number of state decisions which are without territorial uniformity in criminal procedure (JS. 8). However, failure to have uniformity of criminal procedure among the several states is not a substantial federal question. The expected norm is that state governments will vary its laws of criminal procedure to meet the needs of the people. *Salsburg* v. *State of Maryland,* 346 U.S. 545, 552-553 (1954); *Ocampo* v. *United States,* 234 U.S. 91, 98-99 (1914).

In further support of a substantial federal question, the Appellant cites a line of cases (JS. 5) supporting the decision in *Whiteley* v. *Warden, Wyoming State Penitentiary,* 401 U.S. 560 (1971).

> "The decisions of this Court concerning Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." 401 U.S. at ——; 91 S.Ct at 1035.

This is not new law as documented by the numerous prior decisions cited by this Court in *Whiteley, supra.*

What is new is Appellant's use of the line of cases in *Whiteley, supra,* for the very first time on this appeal, to support new issues unrelated to the validity of the state statutes (App. B, p. A 9) vesting quasi-judicial power in the municipal court clerks to issue arrest warrants, and impliedly therewith, determine probable cause, as *expressly passed upon* by the Supreme Court of Florida. (App. A, pp. A 1-3).

Appellee urges this Court to distinguish two unrelated questions. The first question was presented timely and properly, and expressly passed upon, that being the validity of the state statutes vesting in the city clerk the power to issue arrest warrants, and impliedly therewith, the power to determine probable cause. (App. A, pp. A 1-3). The second question, unrelated to the first, seeking this Court's probable jurisdiction and silent sanction to be briefed and orally argued, is the insufficiency of the affidavit as a rubber stamp procedure not meeting the probable cause requirements of *Whiteley, supra.*

The first question involves, in the first instance, the authority or power of the city clerk to act at all.

The second question, unlike the first, assumes the authority or power is valid, but not properly exercised.

Which question did Appellant argue to the Supreme Court of Florida?

> "Appellant says the clerk or deputy clerk of the municipal court is not a judicial officer such as could *perform the duties* of determining probable cause *or act* as a neutral or detached magistrate in the exercise of a judicial discretion to determine the existence of probable cause." Shadwick v. City of Tampa, 250 So.2d 4, 5 (1971); App. A, p. A 2. (Emphasis supplied).

Appellant has not been tried or convicted in municipal court and has not lost his rights to raise these new issues upon the ultimate disposition of these appellate proceedings, which commenced immediately after his arrest. (R. 6-7; App. C, pp. A 12-13).

Even admitting, for the sake of argument, that the affidavit (R. 4; App. C, p. A 10) is insufficient because of its conclusionary terms, and therefore fails to meet the probable cause requirements of *Whiteley, supra,* a finding by this Court of probable jurisdiction on this issue would simple be a rehash of the decisions in *Whiteley* and an obvious waste of this Court's time. The question having already been passed upon by this Court, it is not substantial.

Furthermore, such a question does not involve the validity of a state statute necessary to invoke this Court's jurisdiction sought by Appellant in this appeal under 28 U.S.C. 1257 (2).

The properly raised question from the final judgment below (App. A, pp. A 1-3) that the quasi-judicial power under state statutes for a city clerk of municipal court to issue arrest warrants, and act as a neutral and detached magistrate to determine probable cause has already been favorably passed upon by prior decisions of this Court. *Giordenello* v. *U.S.*, 357 U.S. 480, 486 (1958); *Ocampo* v. *U.S.*, 234 U.S. 91, 100 (1914); *J. D. Compton* v. *State of Alabama*, 214 U.S. 1, 7 (1909); *In re Keller*, 36 F. 681 (1888), cited with approval in *Pettibone* v. *Nichols*, 203 U.S. 192, 204 (1906).

Where prior decisions of this Court leave no room for *real controversy*, the federal question is not substantial. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902).

CONCLUSION I.

In conclusion, Appellee respectfully shows the Court that this appeal does not present a substantial federal question.

WHEREFORE, Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Florida.

ARGUMENT II.

The federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

The only final judgment reviewable is that of the Supreme Court of Florida expressly passing on the validity of the state statutes here involved (App. B, p. A

9) as not being repugnant to the Fourth and Fourteenth Amendments, United States Constitution.

However, Appellant in the Jurisdictional Statement raises issues of the sufficiency of the affidavit being in conclusionary terms, the standards of probable cause required to issue warrants in accordance with the decisions in *Whiteley, supra,* and "rubber stamp" warrant procedures. (JS. pp. 1-9).

These issues were not raised, briefed or argued in the trial court, the Municipal Court of the City of Tampa (R. 6, 7, 8; App. C, pp. A 12-14); nor in the Circuit Court, Hillsborough County, Florida, on Petition for Writ of Certiorari (R. 1, 2, 3, 9; App. C, pp. A 15-18); nor on appeal to the intermediate state court, the District Court of Appeal, Second District, by assignments of error (R. 11; App. C, p. A 19), except in a passing comment on oral argument and then raised for the first time in Appellant's Petition for Rehearing (R. 62, 63, 64, 65; App. C, pp. A 20-23) to that intermediate court and not briefed or argued in the Supreme Court of Florida by Appellant (App. D, pp. A 24-55) or Appellee. (App. D, pp. A 56-76).

In the Supreme Court of Florida, ". . . Such assignments of error as are not argued in the briefs will be deemed abandoned and may not be argued orally . . ." 32 Florida Statutes Annotated, Appellate Rule 3. 7(i) at p. 160.

Decisions of intermediate state courts are not final judgments reviewable by this Court. (App. A, pp. A 4-8). *Banks* v. *California,* 395 U.S. 708 (1969).

In short, Appellant failed to press the issues to the highest court of this State and having failed to do so these federal questions sought to be reviewed were not timely or properly raised, or expressly passed on. *DeBacker* v. *Brainard*, 396 U.S. 28 (1969); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Palmieri* v. *Florida*, 393 U.S. 218 (1969); *Oxley Stave Co.* v. *Butler Co.*, 166 U.S. 648 (1897).

The Jurisdictional Statement contains unsubstantiated inferences that the clerk did not have sufficient information to support an independent judgment of probable cause. (JS. p. 5).

> "... the jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere *inferences*, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *Oxley Stave Co.* v. *Butler Co.*, 166 U.S. 648, 655 (1897). (Emphasis supplied.)

Appellant has relied heavily upon *Whiteley, supra,* in the Jurisdictional Statement to support a substantial federal question, but in *Whiteley* the issues of insufficiency of the warrant and probable cause had been preserved at *every* stage in the proceedings below.

> "Yet the state concedes, as on the record it must, that at *every* stage in the proceedings below petitioner argued the insufficiency of the warrant as well as the lack of probable cause at the time of the arrest." 401 U.S. ——, 91 S.Ct. at 1037. (Emphasis supplied.)

This Appellant has failed to do so at *every* stage in the proceedings below.

Furthermore, *Whiteley* did not involve the validity of a state statute and ultimately turned on a warrantless arrest and seizure in a county other than the one in which the original warrant was issued.

By reason of the foregoing jurisdictional defects, 28 U.S.C. 2103 is not applicable whereby this appeal should be summarily dismissed without considering this appeal as a petition for certiorari. *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1943).

CONCLUSION II.

In conclusion, Appellee respectfully shows the Court that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on by, the Supreme Court of Florida.

WHEREFORE, Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Florida.

ARGUMENT III.

The Court should not set the case for argument because the decision below is so obviously correct as to warrant no further review.

The decision on appeal is founded solidly upon fundamental principles of law so well established as to warrant no review.

1. Determination of probable cause for arrest need not be confined to strictly judicial officers, as such a function is only quasi-judicial. *Ocampo* v. *United States*, 234 U.S. 91, 100 (1914).

2. Acts, partially judicial in nature *(quasi-judicial)*, such as the power to issue arrest warrants, may be performed by clerks when so provided by *legislative provision (statutes)* even when their other duties are purely ministerial. 22 C.J.S. Criminal Law Sec. 318, pp. 820, 821; 15 Am. Jur. 2d, Clerk of Court Sec. 22, pp. 528, 529.

3. Arrest warrant procedure requires that inferences from facts which lead to the complaint "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Giordenello* v. *United States*, 357 U.S. 480, 486 (1958).

4. A "magistrate" is a public officer, possessing such power, legislative, executive, or judicial, as the government appointing him may ordain, although in a narrow sense he is regarded as an inferior judicial officer and the definition of the word "magistrate" as applied in the case law in the Florida and the Federal systems to determine the constitutionality of a warrant system is given a broad meaning. *J. D. Compton* v. *State of Alabama*, 214 U.S. 1, 7 (1908); *State ex rel. Miller* v. *McLeod*, 142 Fla. 254, 194 So. 628, 630 (1940).

The lower court in its decision on appeal (App. A. pp. A 1-3) did not depart from these guiding principles and held the state statutes valid.

CONCLUSION III.

In conclusion, Appellee respectfully shows the Court that this case should not be set for argument because the decision below is so obviously correct that it should not be altered or reviewed.

WHEREFORE, Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Florida.

Respectfully submitted,

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Counsel for Appellee

APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1971

Case No. 40,156

GERALD SHADWICK,
Appellant,
v.
CITY OF TAMPA,
Appellee.

Opinion filed June 16, 1971

An appeal from the District Court of Appeal, Second District

Malory B. Frier, for Appellant

William Reece Smith, Jr., City Attorney and Gerald H. Bee, Assistant City Attorney, for Appellee

ADKINS, J.

This is an appeal from a decision of the District Court of Appeal, Second District (*Shadwick v. City of Tampa,* 237 So.2d 231), which directly and initially passed upon the validity of certain statutes.

The only question involved is whether FLA. STAT. (1967) § 168.04, F.S.A., and §§ 495 and 160.1 of the Charter of the City of Tampa (the provisions of these statutes are included in the District Court of Appeal opinion, 237 So.2d 231, 232) are unconstitutional insofar as they purport to vest in the city clerk the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for arrest. The Florida Constitution provides that special laws or gen-

eral laws of local application may be enacted by the Legislature pertaining to the duties of municipal officers. FLA.CONST. art III, § 11(a)(1) (1968). Similar provisions were included in the earlier constitution. FLA. CONST., art. III § 20 (1885). Pursuant to this authority, the Legislature enacted special laws pertaining to the duties of clerks and deputy clerks of the municipal courts in the City of Tampa, and incorporated in the Charter of the City of Tampa provisions authorizing the clerk of the municipal court to issue warrants for arrest. The powers granted the clerk of the municipal court, or his deputies, in the special law were not incompatible or in conflict with the general laws of the State of Florida. See FLA. STAT. § 168.04 (1967); *Headley v. State,* 166 So.2d 479 (Fla.App.3d, 1964).

Appellant says the clerk or deputy clerk of the municipal court is not a judicial officer such as could perform the duties of determining probable cause or act as a neutral or detached magistrate in the exercise of a judicial discretion to determine the existence of probable cause. However, the detrmination of probable cause for an arrest need not be confined to strictly judicial officers, as such a function is only quasi-judicial. *Ocampo v. U. S.,* 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231 (1914).

Therefore, the statutes authorizing a clerk or deputy clerk of a municipal court to issue arrest warrants are not an unconstitutional exercise or delegation of "judicial power" and conform to the requirement of the Fourth and Fourteenth Amendments to the Constitution of the United States. See *Florida Motor Lines v. Railroad Commissioners,* 100 Fla. 538, 129 So. 876 (1930).

The general law is stated in 22 C.J.S., *Criminal Law,* § 318, pp. 820, 821, as follows:

> "When so provided by statute, the authority to issue warrants may be vested in officers whose other duties are purely ministerial, such as clerks, * * * ."

and further in 15 Am.Jur.2d, *Clerks of Court* § 22, pp. 528, 529:

"A clerk of court may not exercise judicial power except by constitutional or *legislative provision,* and then only in accordance with the strict language of the provision. * * *

"Certain acts, although partially judicial in nature, may be performed by the clerk of the court. A familiar example is the power to issue warrants of arrest." (Emphasis supplied)

Arrest warrant procedure requires that inferences from facts which lead to the complaint "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Giordenello v. U.S.,* 357 U.S. 480, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503 (1958). The word "magistrate" has been given a broad meaning. In a general sense, a magistrate is a public officer, possessing such power, legislative, executive, or judicial, as the government appointing him may ordain although in a narrow sense he is regarded as an inferior judicial officer. See *J. D. Compton v. State of Alabama,* 214 U.S. 1, 29 S.Ct. 605, 607, 53 L.Ed. 885 (1909); *State ex rel. Miller v. McLeod,* 142 Fla. 254, 194 So. 628, 630 (1940). The clerk and deputy clerks of the municipal court of the City of Tampa are neutral and detached "magistrates," unconnected with law enforcement, for the purpose of issuing arrest warrants within the requirements of the United States Constitution, Fourth and Fourteenth Amendments, and FLA. CONST. art I, § 12 (1968), by virtue of the Florida Statutes fixing their powers and duties to issue arrest warrants.

The opinion and decision of the District Court of Appeal is approved and affirmed.

ROBERTS, C. J., ERVIN, CARLTON, McCAIN, DEKLE and DREW, (Retired), JJ., concur

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JULY TERM, A. D. 1970

CASE NO. 70-62

GERALD SHADWICK,
Appellant,
v.
CITY OF TAMPA,
Appellee.

Opinion filed June 24, 1970

Appeal from the Circuit Court
for Hillsborough County

Neil C. McMullen, Judge.
Malory B. Frier, Tampa, for Appellant.

Gerald H. Bee, Assistant City Attorney, Tampa,
for Appellee.

HOBSON, CHIEF JUDGE.

Appellant was charged in Tampa Municipal Court of careless driving while his ability to drive was impaired. He had been arrested under a warrant issued in the name of the city clerk of the City of Tampa, and signed by a deputy clerk. Appellant moved to quash the warrant in the municipal court on the grounds that the issuance of a warrant by a city clerk was the exercise of a judicial function by a non-judicial officer, and therefore a violation of the separation of powers under Fla. Const. Art. II, § 3 (1968), and Fla. Const. Art, V, § 1 (1968) which vests the judicial power in the courts of the state. Appellant's motion was denied, and he petitioned the Circuit Court of Hillsborough County for a writ of common law certiorari to review the denial of motion to quash the warrant. The petition was denied by the Circuit Court, and the appellant appealed to the

Supreme Court of Florida. The Supreme Court found the matter to be within the jurisdiction of this court and transferred the case here.[1]

Appellant contends that Fla.Stat. § 168.04 (1967),[2] and Sections 495[3] and 160.1[4] of the charter of the City of Tampa are unconstitutional insofar as they purport to vest in the city clerk the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest. These and like provisions have been dealt with before by Florida courts,[5] but the constitutionality of the procedure has not been raised in this state.

Appellant contends that the decision as to whether a warrant should issue is a judicial function and that because the legislature may not exercise judicial functions, it may not delegate judicial functions by statute

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[1] F.A.R. 2.1(a)(5)(d).

[2] FLA. STAT. § 163.04 (1967): "CLERK AND MARSHAL MAY TAKE AFFIDAVITS AND ISSUE WARRANT.
"The clerk may administer an oath to and take affivadit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaints and issue warrants for the arrest of persons complained against."

[3] LAWS OF FLA. 1903, Ch. 5363, §17:
"The chief of police, or any policeman of the city of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person."

[4] LAWS OF FLA. 1961, Ch. 61-2915, §1:

[5] United States v. Melvin, 258 F.Supp. 252 (S.D. Fla. 1966); Headley v. State ex rel. Bethune, 166 So.2d 479 (Fla. App. 3d 1964).

to non-judicial officers. We disagree, and hold that the decision whether to issue a warrant is, at most, quasi-judicial and not within the "judicial power" reserved by the constitution to the judicial branch. *See generally* Florida Motor Lines v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930) *E.g.* Kreulhaus v. City of Birmingham, 164 Ala. 623, 51 So. 297 (1909); State v. Ruotolo, 52 N.J. 508, 247 A.2d 1 (1968); State v. Thompson, 151 S.E.2d 870 (W.Va. 1966); *cf.* State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959). *Contra,* State v. Paulick, 277 Minn. 140, 151 N.W.2d 591 (1967).

State v. Paulick, supra, relied upon heavily by appellant, dealt with the very question before this court in the case sub judice. There, the Supreme Court of Minnesota held that a statute which vested authority to issue arrest warrants in clerks of municipal courts was unconstitutional as a violation of the separation of powers. Although the court's opinion is scholarly and appealing, we chose to follow the reasoning of the Supreme Court of New Jersey in State v. Ruoloto, supra. The court stated at pages 3-5:

> "With regard to the issuance of a warrant, there is no doubt that if a determination of 'probable cause' is to have any meaning, it must be made by a neutral and detached court official who is immune from 'the often competitive enterprise of ferreting out crime.' Johnson v. United States, supra, 333 U.S. at 14, 68 S.Ct. at 369, 92 L.Ed. at 440."
>
> * * * * *
>
> "A finding of neutrality, however, goes only part of the way to justify the challenged procedure. Before a deputy clerk is constitutionally permitted to determine whether the facts as alleged by the complainant constitute probable cause that an offense has been committed and that the defendant is the culprit, we must ask: Is the deputy clerk qualified to exercise the necessary judgment?"
>
> * * * * *

"[W]e believe that background in the law, although desirable, is not a requirement imposed by the Constitution on a determination of probable cause. After all, probable case [sic] is a standard which is designed to be applied by laymen. A policeman may make an arrest without a warrant where there is probable cause, i.e., where there are facts which would lead 'a man of reasonable caution' to believe a crime has been or is being committed."

* * * * *

"Throughout the history of this country laymen have served in various judicial capacities, and particularly in order to determine the existence of probable cause. United States Commissioners, appointed by the United States District Courts, have been invested with the power to issue arrest warrants in federal prosecutions. Fed. Rules Crim. Procedure 3, 4. Today, almost one-third of the United States Commissioners are laymen. See Staff Memorandum, Subcommittee on Improvements in Judicial Machinery, reported in Hearings, Senate Judiciary Committee, Federal Magistrates Act, 1967, p. 30. A grand jury, from which lawyers are routinely excluded, applies the standard of probable cause in determining whether to return an indictment. Grand jurors and petit jurors apply sundry rules of law to factual complexes; our jury system rests upon the premise that one need not be a lawyer to understand guiding principles and to make judgments in the light of them.'

We feel that the emphasis should not be placed upon fine distinctions between judicial officers and non-judicial officers, but instead upon the requirement that the person who issues the warrant be neutral and disinterested, and that such person make a finding of probable cause before issuing a warrant. We see no evidence that the city clerk is unalterably aligned with the forces of

law enforcement[6] and therefore he may fulfill the role of the neutral person which the constitution requires to be placed between the police and the public.

Appellant argues that the city, by allowing the clerk to issue arrest warrants, was providing nothing more than a "rubber stamp" for the police. If this were the case, it would be clearly unacceptable. However, there is nothing in the record to substantiate this allegation.

For the reasons stated, we hold the challenged statutes constitutional and the order appealed is

AFFIRMED.

LILES and McNULTY, JJ., CONCUR.

[6] *E.g.* State v. Mathews, 270 N.C. 35, 153 S.E. 2d 791 (1967); State ex rel. White v. Simson, 28 Wis. 2d 590, 137 N.W. 2d 391 (1965).

APPENDIX B

1. Florida Statute (1967), Section 168.04, F.S.A.

   The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaint and issue warrants for the arrest of persons complained against.

2. Section 495, Charter of the City of Tampa, enacted by Laws of Fla. 1903, Ch. 5363, Section 17.

   The Chief of Police, or any policeman of the City of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person.

3. Section 160.1, Charter of the City of Tampa, enacted by Laws of Fla. 1961, Ch. 61-2915, Section 1.

   The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the appproved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court.

APPENDIX C

IN THE MUNICIPAL COURT OF THE
CITY OF TAMPA, FLORIDA

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH) AFFIDAVIT

To the Chief of Police or any Policeman of the City of Tampa, whereas, Cpl. W. H. Larder, City of Tampa Police Department, Tampa, Florida has this day made complaint before me that on the 8th day of February, A.D. 1969, in the City aforesaid, one Gerald Shadwick, 14912 Pine Crest, Tampa, Florida did unlawfully DRIVE A VEHICLE IN A CARELESS MANNER IN DISREGARD FOR THE SAFETY OF PERSONS OR PROPERTY WHILE HIS ABILITY TO DRIVE A MOTOR VEHICLE IS IMPAIRED BY ALCOHOL OR DRUG. 36-89B City of Tampa Code.

W. H. LARDER
Affiant

GERALD SHADWICK
Defendant

Sworn to and subscribed before me this 6th day of March, A.D. 1969.

W. L. STARK, City Clerk

By Deputy NELSON P. GULLO
City Clerk of the City of Tampa

No. 64028

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

This is to certify that the above and foregoing is a true and correct copy of the Affidavit for Warrant in the Municipal Court, in the case of the City of Tampa vs. Gerald Shadwick as the same appears of record in Municipal Court Docket No. F156951, Warrant No.64028, Record of the Municipal Court of the City of Tampa, Florida.

Dated this 14th day of April, A.D. 1969.

W. L. STARK, City Clerk

By ROBERT D. CARDEN, D. C.

IN THE MUNICIPAL COURT OF THE
CITY OF TAMPA, FLORIDA

STATE OF FLORIDA }
COUNTY OF HILLSBOROUGH } WARRANT

To the Chief of Police or any Policeman of the City of Tampa, whereas, Cpl. W. H. Larder, City of Tampa Police Department, Tampa, Florida has this day made complaint before me that on the 8th day of February, A.D. 1969, in the City aforesaid, one Gerald Shadwick, 14912 Pine Crest, Tampa, Florida did unlawfully DRIVE A VEHICLE IN A CARELESS MANNER IN DISREGARD FOR THE SAFETY OF PERSONS OR PROPERTY WHILE HIS ABILITY TO DRIVE A MOTOR VEHICLE IS IMPAIRED BY ALCOHOL OR A DRUG, 36-89B City of Tampa Code.

These are therefore to command you to arrest the body of Gerald Shadwick, the said defendant, and bring him before the Judge of the Municipal Court of the City of Tampa, Florida, to be dealt with according to law.

Given under my hand and seal of said City this 6th day of March, A.D. 1969.

W.. L. STARK, City Clerk

By Deputy NELSON P. GULLO
City Clerk of the City of Tampa

No. 64028

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

This is to certify that the above and foregoing is a true and correct copy of the Warrant in the Municipal Court, in the case of the City of Tampa vs.. Gerald Shadwick, as the same appears of record in Municipal Court Dockket No. F156951, Warrant No. 64028, Record of the Municipal Court of the City of Tampa, Florida.

Dated this 18th day of April, 1969.

W. L. STARK, City Clerk

ROBERT D. CARDEN, D. C.

IN THE MUNICIPAL COURT OF THE
CITY OF TAMPA, STATE OF FLORIDA

F156951

CITY OF TAMPA, Plaintiff,
vs.
GERALD SHADWICK, Defendant.

MOTION TO QUASH WARRANT

COMES NOW the defendant, GERALD SHADWICK, by his undersigned attorney and moves the Court to quash the warrant heretofore issued out of this Court on the 6th day of March, 1969, and the docket entry made pursuant thereto upon the following grounds and each of them:

1. Said warrant of arrest was issued by a non-judicial officer, to wit, W. L. Stark, City Clerk, contrary to the express provisions contained in Section III of Article II of the Florida Constitution of 1968.

2. Although the revised charter of the City of Tampa of 1927, in Section 22 thereof, now appearing in Section 159 of Chapter IX of the compiled City Charter of the City of Tampa purports to make the City Clerk of the City of Tampa ex officio Clerk of the Municipal Court, said Charter did not authorize the City Clerk of the City of Tampa, a non-judicial officer, to exercise any judicial duties, and specifically, did not authorize said Clerk to issue warrants for arrests, said powers being reserved to the Municipal Judge of the City of Tampa in Section 21 of the revised Charter of 1927, now contained in Section 410 of the compiled Charter of the City of Tampa.

3. Although Chapter 61-2915, Special Acts of 1961, of the laws of Florida, in Section I thereof, now contained in Section 160.1 of the compiled Charter of the City of Tampa purports to authorize the City Clerk of the City of Tampa, with the approval of the Mayor, to

appoint one or more deputies to have and exercise the same powers as the City Clerk himself, including but not limitd to the issuance of warrants, said Special Act did not specify whether said warrants which said deputy clerks were authorized to issue, were warrants for arrest, warrants for the payments of moneys, or distress warrants to collect taxes, and that in any event, the City Clerk for the City of Tampa not ever having possessed powers to issue warrants for arrest of persons under the City of Tampa Charter, none of his deputies can possess any powers which the City Clerk, himself, does not possess.

4. That in any event, insofar as Section I of Chapter 61-2915, Special Acts, Laws of Florida, 1961, purport to empower the City Clerk or any of his deputies, for the City of Tampa, to issue warrants for arrest, the same is invalid, unconstitutional and void by attempting to vest judicial powers in a non-judicial officer, contrary to the express language contained in Section III of Article II of the Constitution of Florida of 1968.

I do certify that a true copy of the foregoing Motion has been furnished to the City Attorney for the City of Tampa, by delivery, at the Police Station in the City of Tampa, this 13th day of March, 1969.

MALORY B. FRIER
Attorney for Defendant
LAW, Inc. of Hillsborough County
8145 Nebraska Avenue
Tampa, Florida 33604

CERTIFICATE OF CLERK

I hereby certify that the above and foregoing is a true and correct copy of Motion Filed and Judgement of the Municipal Court, in the case of the City of Tampa vs. Gerald Shadwick as the same appears of record in Municipal Court Docket No. F156951, Record of the Municipal Court of the City of Tampa, Florida.

Dated this 14th day of April, A.D. 1969.

W. L. STARK, City Clerk
By ROBERT D. CARDEN, D. C.

IN THE MUNICIPAL COURT OF THE CITY OF TAMPA, STATE OF FLORIDA.

F156951

CITY OF TAMPA, Plaintiff,
vs.
GERALD SHADWICK, Defendant.

ORDER DENYING MOTION TO QUASH

This cause having come on for hearing pursuant to rule of Court upon the Motion of the defendant to Quash the warrant issued by the City Clerk as ex officio Clerk of this Court on the 6th day of March, 1969, and the Court having heard argument of counsel and read briefs filed by defense counsel in support of said motion, it is.

ORDERED that the defendant's Motion to Quash said warrant is hereby denied.

DONE AND ORDERED at Tampa, Florida, the 7th day of April, 1969 nunc pro tunc this 18th day of April, 1969.

CHARLES H. SCRUGGS, III
Judge.

CLERK'S CERTIFICATE

I hereby certify that the above and foregoing is a true and correct copy of Order Denying Motion to Quash in the Municipal Court, in the case of the City of Tampa vs. Gerald Shadwick, as the same appears of record in Municipal Court Docket No. F156951, Record of the Municipal Court of the City of Tampa, Florida.
Dated this 18th day of April A. D. 1969.

W. L. STARK, City Clerk

By ROBERT D. CARDEN, D. C.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
Division H

No. 177715

GERALD SHADWICK, Petitioner,
vs.
CITY OF TAMPA, Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner, GERALD SHADWICK, respectfully represents unto this Honorable Court as follows:

1. This is a Petition for Writ of Common Law Certiorari directed to the Municipal Court of the City of Tampa, Florida, under and pursuant to the provisions of Rule 1.640, of the Rules of Civil Procedure.

2. Petitioner was arrested by a City Police Officer of the respondent, City of Tampa, on the 6th day of March, 1969, under color of a warrant issued on that date in the name of W. L. Stark, City Clerk, and signed by Nelson P. Gulle, as Deputy Clerk.

3. On the 11th day of March, 1969, the petitioner filed a Motion in the Municipal Court of the City of Tampa, Florida, to Quash said warrant and the docket entry made pursuant thereto upon the grounds that said warrant was issued by a non-judicial officer, namely the City Clerk of the City of Tampa, who was not vested with judicial powers.

4. Said Motion came on for hearing before said Municipal Court on the 7th day of April, 1969, at which time said Motion was denied by said Municipal Court.

5. This Petition for Writ of Certiorari is accompanied by a certified transcript of the record of the pro-

ceedings petitioner seeks to have reviewed, pursuant to the provisions of Rule 1.640 of the Rules of Civil Procedure, including the following items:

A. Affidavit of Corporal W. H. Larder, dated March 6,, 1969.

B. The warrant issued March 6, 1969, under which petitioner was arrested as aforesaid.

C. Defendant's Motion to Quash said warrant filed March 11, 1969.

D. The Order of the Municipal Court for the City of Tampa, denying said Motion to Quash, entered April 7, 1969, nunc pro tunc on April 18, 1969.

6. By the record so made, petitioner would show unto this Honorable Court that said Municipal Court did not proceed in said cause according to the essential requirements of the law, in the following matters and for the following reasons, to wit:

A. The City Clerk for the City of Tampa is a ministerial officer and is not possessed of judicial powers either under Section 22 of the Revised Charter of the City of Tampa of 1927 (Compiled Charter of the City of Tampa, Section 159) or under Section 1, Chapter 61-2915, Special Acts of the Legislature, Laws of Florida 1961 (Section 160.1 of the Compiled Charter of the City of Tampa), said power to issue warrants of arrest being expressly reserved to the Municipal Judges of the Municipal Court of the City of Tampa by Section 21 of the Revised Charter of 1927 for the City of Tampa (Section 410 of the Compiled Charter of the City of Tampa).

B. That insofar as Section 168.04 of the Florida Statutes purports to vest judicial powers in the City Clerk for the City of Tampa to issue arrest warrants, or insofar as any attempt is made to read such powers into the City Charter of the City of Tampa, the same are clearly invalid and unconstitutional for the reason that the same violates the

Separation of Powers clauses contained in Section 3 of Article II and Section 1 of Article V of the Constitution of Florida, as well as the due process and equal protection clauses contained in Sections 2 and 9 of Article 1 of the Constitution of Florida and the Fifth and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, the premises considered, petitioner prays that this Honorable Court will grant unto your petitioner a Writ of Certiorari directed to the Municipal Court of the City of Tampa, Florida, requiring that the record of said Court, together with the Order of said Court Denying Petitioner's Motion to Quash the warrant in said cause, be certified to this Court and that this Honorable Court will thereupon proceed to review the same and determine that the said Order Denying Petitioner's Motion to Quash said warrant is erroneous and void for the reasons heretofore pointed out, and will Quash the same and grant unto your petitioner such further and other relief as the nature of the case may require and as to this Court may seem proper in the premises.

MALORY B. FRIER
Attorney for Petitioner
LAW, Inc. of Hillsborough County
8145 Nebraska Avenue
Tampa, Florida 33604

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me, the undersigned authority, personally came Malory B. Frier, who being by me first duly cautioned and sworn upon oath deposes and says that he is the attorney for the Petitioner in the above styled cause and as such, is duly authorized to make this affidavit for and in behalf of said Petitioner; that he has read and knows the contents of the above and foregoing Petition for Writ of Certiorari and that the same is true.

MALORY B. FRIER
MALORY B. FRIER

Sworn to and subscribed before me at Tampa, Florida, this 23rd day of April, 1969.

EVELYN F. RODRIGUEZ
Notary Public
My Commission Expires: 10-21-72

CERTIFICATE OF SERVICE

I do certify that a true copy of the foregoing Petition has been furnished to the City Attorney, whose office is located in the City of Tampa Police Station, by delivery, this 23rd day of April, 1969.

MALORY B. FRIER

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA, HILLSBOROUGH COUNTY, CIVIL ACTION

Case No. 177,715

Division "H"
GERALD SHADWICK, Petitioner,
vs.
CITY OF TAMPA, Respondent.

ORDER DENYING WRIT OF CERTIORARI

THIS CAUSE came on to be heard before the Court uppon Petition for issuance of Writ of Certiorari, the Court having heard and considered the arguments of respective counsel together with the Briefs filed by both the Petitioner and Respondent, and the Court being otherwise fully advised in the premises, it thereupon,

CONSIDERED, ORDERED and ADJUDGED that Issuance of Writ of Certiorari on Petition therefore, be, and the same is herein and hereby, denied.

DONE AND ORDERED in Chambers at Tampa, Florida, this 23rd day of July, 1969.

NEIL C. MCMULLEN, Circuit Judge

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA, HILLSBOROUGH COUNTY, CIVLL ACTION

Case No. 177,715
Division "H"

GERALD SHADWICK, Petitioner,
vs.
CITY OF TAMPA, Respondent.

ASSIGNMENTS OF ERROR

GERALD SHADWICK, the petitioner, hereby assigns the following errors for review on his appeal to the Supreme Court of Florida:

1. The Trial Court erred by entering the Order Denying Writ of Certiorari, dated July 23, 1969, and rendered and recorded July 24, 1969 in Circuit Court Order Book 722 at page 705 of the public records of Hillsborough County, Florida.

2. The Trial Court erred by refusing to grant the Petition for Writ of Certiorari directed to the Municipal Court for the City of Tampa, Florida, as prayed in the Petition.

3. The Trial Court erred by refusing to quash the Order of the Municipal Court of the City of Tampa, Florida, dated and rendered April 7, 1969 which denied petitioner's Motion to Quash an arrest warrant issued by a deputy clerk of said Municipal Court without prior determination of probable cause by a judicial officer.

I do certify that a true copy of the foregoing Assignments of Error has been furnished to William Reece Smith, Jr., City Attorney, P. O. Box 3239, Tampa, Florida 33601 and to Gerald H. Bee, Assistant City Attorney, 729 First Federal Building, Tampa, Florida 33602, Attorneys for respondent, by mail, this 21st day of August, 1969.

MALORY B. FRIER
Attorney for Petitioner
LAW, Inc. of Hillsborough County
8127 Nebraska Avenue
Tampa, Florida 33604

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

Case No. 70-62

GERALD SHADWICK, Appellant,
vs.
CITY OF TAMPA, Appellee.

PETITION FOR REHEARING

The appellant, GERALD SHADWICK, petitions this Honorable Court to grant a rehearing upon his appeal, pursuant to the provisions of Rule 3.14 F.A.R., and would show unto the Court as follows:

1. The statement contained in the first sentence of this Court's opinion filed June 24, 1970, that the appellant had been "convicted" of the offense of "driving under the influence" of alcohol or drugs is apparently the result of an oversight or clerical error in two respects, to wit:

a. The appellant has not been convicted of any offense, but has merely sought timely relief from an arrest warrant he believes invalid in order not to foreclose that right by voluntarily submitting himself to the jurisdiction of the Municipal Court. See appellant's Petition for Writ of Certiorari (R1) and appellant's brief at pages 2 through 5.

b. Appellant has not been charged with "driving under the influence" but has been charged with the lesser offense of "careless driving" while his "ability to drive is impaired." See the affidavit of W. H. LARDER, dated March 6, 1969, and the arrest warrant issued the same date. (R 4 and 5).

2. The statement contained in the next to the last sentence of said opinion that there is nothing in the record on this appeal to substantiate appellant's accusa-

tion that allowing the Clerk to issue arrest warrants merely provided a rubber stamp for the police overlooks or fails to consider the warrant (R5) and the affidavit upon which it was issued (R4) contained in the record on appeal. While the documents contained in the record on appeal are merely xerox or photographic reproductions of the original affidavit and warrant, an inspection of those documents reveals the following matters which the Court failed to consider:

a. The affidavit and warrant are pre-printed forms constituting a single unit or set whereby carbon paper is merely inserted between the affidavit and the warrant, the blank spaces (excepting the specific charge are filled in by typewriting on the affidavit in such a manner as to cause the same words and figures to be copied onto the warrant by the carbon paper. (Note positioning of the date on the warrant and compare with the affidavit.)

b. The charge contained in both the affidavit and the warrant was actually stamped therein with a rubber stamp consisting of a mere conclusion stated in the language of the ordinance cited without any affirmative allegations that the complaining officer spoke with personal knowledge of the matter contained therein and without otherwise indicating any sources for the officer's belief or setting forth any other sufficient basis upon which a finding of probable cause could be made sufficient to authorize the issuance of an arrest warrant because such deficiencies cannot be cured by the reliance of any *judicial officer* upon a presumption that the affidavit was made upon personal knowledge of the complaining officer under the rule announced by the United States Supreme Court in Giordenello v. U.S., 357 U.S. 480, 2 L.Ed. 2d 1503, 78 S.Ct. 1245, cited at page 6 of appellant's brief.

3. By citing Florida Motor Lines v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930) as authority for the proposition that the exercise of "quasi-judicial"

powers does not constitute the exercise of "judicial power" under the State Constitution, the Court overlooked or failed to consider Article V, Section 35, of the Florida Constitution as amended in 1910 which expressly authorized the Legislature to grant judicial powers to the Florida Railroad Commission, and upon which the Florida Supreme Court relied in that case. See 129 So. at pages 881 and 883.

4. By relying upon the New Jersey decision of State v. Ruotolo, 52 N.J. 508, 247 A.2d 1 (1968), the Court overlooks or fails to consider the fallacy implicit in that Court's reasoning in the following particulars:

a. The fact that one-third of all U. S. Commissioners are laymen does not alter the fact that they are, in fact, judicial officers with limited trial jurisdiction under Title 18, Section 3401, U. S. Code, enacted by Congress pursuant to authority contained in Article I, Section 8, Clause 9 of the United States Constitution.

b. The fact that Grand Jurors and petit jurors apply sundry rules of law to factual situations does not alter the fact that the Clerk of the Municipal Court does not receive a "charge" or instructions from the Court such as jurors received from the presiding judge, or others legally knowledgeable which he can substitute for his independent knowledge or lack of knowledge of the law.

c. The fact that policemen may arrest without warrant upon probable cause in felony cases overlooks the rule started in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 122 L.Ed. 2d 723 (1964) cited at page 6 of appellant's brief, that a magistrate's determination of probable cause for the issuance of a warrant may be based upon less judicially competent or persuasive evidence than is permitted for policemen when so acting. See 378 U.S. at 111.

5. Finally, this Court's decision that the Legislature may constitutionally delegate to a Court Clerk the "quasi-judicial" authority to determine the existence of probable cause for the issuance of arrest warrants overlooks or fails to consider the decision of the Florida Supreme Court in Otto v. Harllee, 119 Fla. 226, 161 So. 402 (1935), cited at page 7 of appellant's brief that determination of the sufficiency of property descriptions in tax certificates was a judicial function which the same Legislature is prohibited from delegating to such a Court Clerk, and the resulting implication that decisions involving human liberty are not as important and do not possess the same gravity as decisions involving mere property rights.

MALORY B. FRIER
Attorney for Appellant
8127 Nebraska Avenue
Tampa, Florida 33604

CERTIFICATE OF SERVICE

I do certify that a true copy of the foregoing Petition for Rehearing has been furnished by U. S. Mail to WILLIAM REECE SMITH, JR., City Attorney, and GERALD H. BEE, Assistant City Attorney, 729 First Federal Building, Tampa, Florida, this 7th day of July, 1970.

MALORY B. FRIER
Attorney for Appellant

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

Case No. 40,156

GERALD SHADWICK,
Appellant,
vs.
CITY OF TAMPA,
Appellee.

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND APPELLATE DISTRICT
OF FLORIDA

WM. REECE SMITH, JR. and
GERALD H. BEE
Attorneys for Appellee
725 E. Kennedy Boulevard
Tampa, Florida 33602
Telephone: 813/229-7966
MALORY B. FRIER
Attorney for Appellant
1809 N. Howard Avenue
Tampa, Florida 33607
Telephone: 813/253-0087

CERTIFICATE OF SERVICE

I DO CERTIFY that a true copy of the within Appellant's Brief has been furnished to Wm. Reece Smith, Jr., and Gerald H. Bee, Attorneys for Appellee, by mail, this 30th day of November, 1970.

MALORY B. FRIER
Attorney for Appellant

STATEMENT OF THE CASE

This is an appeal from the decision of the District Court of Appeal, Second District of Florida, which has been reported as Gerald Shadwick, Appellant vs. City of Tampa, Appellee, (Fla. App. 2, 1970), 237 So.2d 231. The appellant, Gerald Shadwick, who was also the appellant in the District Court of Appeal, and the petitioner in the common-law certiorari proceeding in the Circuit Court for Hillsborough County, Florida, was originally defendant in the Municipal Court for the City of Tampa, Florida. The appellee, City of Tampa, who was also the appellee in the District Court of Appeal and the respondent in said Circuit Court proceeding, was the prosecuting authority in said Municipal Court proceeding. The following symbols will be used in this Brief:

"R"—Record on Appeal;

"A"—Appendix to Appellant's Brief.

The proceedings which have culminated in the filing of this appeal originated in the Municipal Court for the City of Tampa, Florida, on March 6, 1969, when Corporal W. H. Larder of the City of Tampa Police Department, subscribed and swore to an Affidavit (A 6) before Nelson P. Gullo, as Deputy for W. L. Starke, City Clerk of the City of Tampa, and who thereupon issued a warrant (A 7) for the arrest of the appellant to answer a charge of careless driving while his ability to drive was impaired by alcohol or a drug. The appellant was arrested the same date, and on March 13, 1969, filed his written motion in said Municipal Court to quash that warrant upon the ground that the issuance of such a warrant was the exercise of a judicial function by a non-judicial officer in violation of the separation of powers clause contained in Article II, Section 3 and Article V, Section 1, Florida Constitution of 1968, which vests the judicial power of this state in certain enumerated courts, and that the provisions of the City of Tampa Charter purporting to authorize the issuance of ar-

rest warrants by the City Clerk was, therefore, an unconstitutional delegation of judicial powers. (R 6) Appellant's motion was denied by the Municipal Court on April 7, 1969 (R 8), and on April 23, 1969, appellant filed his petition with the Circuit Court for Hillsborough County, seeking a writ of common-law certiorari to review that order upon the ground that the denial of his Motion to Quash constituted a departure from the essential requirements of law because the warrant procedure and charter provision authorizing it, as well as the general state statute authorizing it, not only violated the cited provisions of our state constitution, but also violated the due process clauses contained in Article I, Sections 2 and 9 of the Florida Constitution of 1968, and the Fourteenth Amendment to the United States Constitution. (R 1) The Circuit Court denied the petition for common-law certiorari (R 9), and the appellant took a timely appeal from that decision to this Court which transferred the same to the District Court of Appeal, Second District of Florida, on January 14, 1970. The District Court of Appeal ultimately rendered its opinion on June 24, 1970 (A 1), and denied appellant's petition for a rehearing (R 62) by an order entered August 5, 1970. (R 66) Within 30 days after that Court's denial of his petition for rehearing, the appellant timely filed his notice of appeal to this Court, pursuant to Article V, Section 4 (2), Florida Constitution, because the District Court's decision directly and initially passed upon the validity of Statutes of this State.

Included in the Appendix to this Brief are the *revised*[1] opinion of the District Court of Appeal (A 1-5), as well as xerox copies of the Affidavit and Warrant attacked (sic.) (A 6, 7) and the applicable sections of the Compiled Charter of the City of Tampa. (A 8-10).

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[1] The original opinion as printed in the Southern Reporter Advance Sheets at 237 So.2d 231 was "revised" by the District Court of Appeals to correctly state that appellant had merely been "charged" (and not convicted) with "careless driving while his ability to drive was impaired" (and not driving under the influence of alcohol or drugs), in response to appellant's petition for rehearing.

POINTS INVOLVED ON APPEAL

I. WHETHER THOSE PROVISIONS OF THE CITY OF TAMPA CHARTER, AS WELL AS SECTION 168.04, FLORIDA STATUTES, WHICH PURPORT TO AUTHORIZE THE CITY CLERK FOR THE CITY OF TAMPA TO ISSUE ARREST WARRANTS WITHOUT ANY DETERMINATION OF PROBABLE CAUSE BY A JUDGE OR MAGISTRATE, ARE AN UNCONSTITUTIONAL DELEGATION OF JUDICIAL POWER?[2]

The lower Court answered this question in the negative.

ARGUMENT

I.

THOSE PROVISIONS OF THE CITY OF TAMPA CHARTER, AS WELL AS SECTION 168.04, FLORIDA STATUTES, WHICH PURPORT TO AUTHORIZE THE CITY CLERK FOR THE CITY OF TAMPA TO ISSUE ARREST WARRANTS WITHOUT ANY DETERMINATION OF PROBABLE CAUSE BY A JUDGE OR MAGISTRATE ARE AN INVALID AND UNCONSTITUTIONAL DELEGATION OF JUDICIAL POWERS.[3]

(A) BOTH THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 12 OF THE 1968 FLORIDA CONSTITUTION PROHIBIT THE ISSUANCE OF AN ARREST WARRANT WITHOUT A PRIOR DETERMINATION OF PROBABLE CAUSE.

The Fourth Amendment to the United States Constitution guarantees that no warrant shall issue for the

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[2] This question is raised by Assignments of Error numbered 1 & 2.

[3] Raised by Assignments of Error numbered 1 and 2.

arrest of any persons except upon probable cause supported by oath or affirmation.[4]

Article I, Section 12 of the 1968 Florida Constitution, and its forerunner, Section 22 of the Declaration of Rights contained in the Florida Constitution of 1885, contained similar wording.[5]

The Supreme Court of the United States has held that the restrictions imposed by the Fourth Amendment apply to arrest warrants, as well as to search warrants,[6] that they extend to the several states under the Fourteenth Amendment,[7] and that the determination of probable cause for the issuance of such warrants involves a determination of whether an offense had been committed, and if so, what reason there is to believe that the defendant committed it.[8]

(B) THE QUESTION OF PROBABLE CAUSE REQUIRED TO SUPPORT THE ISSUANCE OF AN ARREST WARRANT IS A JUDICIAL QUESTION

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[4] "The right of the people to be secure in their persons * * * against unreasonable * * * seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing * * * the persons * * * to be seized * * * "Fourth Amendment, U.S. Constitution.

[5] "The right of the people to be secure in their persons, * * * against unreasonable * * * seizures * * * shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing * * * the person or persons * * * to be seized * * *." Article I, Section 12, Florida Constitution, (1968).

[6] *Giordenello v. U.S.* (1958) 357 U.S. 480, 78 S.Ct. 1245, 1250, 2 L.Ed. 2d 1503; *Wong Sun v. U.S.* (1963) 371 U.S. 471, 83 S.Ct. 471, 9 L.Ed. 2d 441. See also *U.S. v. Melvin* (U.S.D.C., Fla., 1966) 258 F. Supp. 252.

[7] *Ker v. California* (1963) 374 U.S. 23, 30, 83 S.Ct. 1623, 10 L.Ed. 2d 726; *Aguilar v. Texas* (1964) 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723.

[8] *Jaben v. U.S.* (1965) 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed. 2d 353; Rehearing Den. 382 U.S. 873, 86 S.Ct. 19, 15 L.Ed. 2d 114; *Johnson v. U.S.* (1948) 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; see also footnotes 6 and 7.

THAT MUST BE DETERMINED BY A JUDGE OR MAGISTRATE BEFORE A VALID WARRANT MAY ISSUE.

> The Supreme Court of the United States has held: "When the right of privacy must reasonably yield to the right of search, is, as a rule to be decided by a judicial officer, not by a policeman or government enforcement agent."[9]

The Florida Supreme Court has also held, in construing Section 22, Declaration of rights of the 1885 Florida Constitution which has been incorporated into Article I, Section 12 of the 1968 Florida Constitution:

> "The question of 'probable cause' for the issuance of a search warrant to invade the privacy of our dwelling or *person* is a judicial question that must be determined by a judge or magistrate before a valid warrant may issue."[10] (emphasis supplied)

Indeed, the lower court, prior to its decision in the instant case, had indicated that no one is authorized to make the decision to issue an arrest warrant except a judicial officer.[11]

In arriving at the decision appealed from, the District Court of Appeal held that the issuance of a warrant was merely "quasi-judicial" and not within the judicial power reserved to those courts enumerated in Article V, Section 1 of the 1968 Florida Constitution.

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[9] *Johnson v. U.S.* (1948) 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; quoted in *Camara v. Municipal Court* (1967) 387 U.S. 523, 87 S.Ct. 1727 at 1731, 18 L.Ed. 2d 930. See also *U.S. v. Melvin* (U.S.D.C., Fla., 1966) 258 Fed. Supp. 252.

[10] *Samuel v. State* (Fla., 1969) 222 So.2d 3 at 4; *Thurman v. State* (1934) 116 Fla. 426, 156 So. 484 at 488.

[11] *State v. Hickman* (Fla. App. 2, 1966) 189 So.2d 254, upholding a warrant in which the magistrate's signature and seal had been affixed by a member of his clerical staff because there was no showing that the magistrate did not make the actual decision to issue the warrant.

As authority for that proposition, the District Court of Appeal cited several cases, including the previous decision of this Court in *Florida Motor Lines v. Railroad Commissioners.*[12] However, an examination of that case reveals that this Court there relied on then Article V, Section 35 of the 1885 Florida Constitution as amended in 1910, which expressly authorized the Legislature to grant judicial powers to the Florida Railroad Commission. Thus, there was really no question of "quasi-judical powers" in that case, since the Constitution had, in fact, granted judicial powers to the Florida Railroad Commission.

The decision of the District Court of Appeal and the cases cited by it in support of its decision that the arrest warrant procedure is, at most, "quasi-judicial" and not a judicial function, fails to recognize the plain intent of our State and Federal Constitutions that the determination of probable cause required for the issuance of a valid arrest warrant must be made by a judicial officer.[13]

It is not every arrest and not every search that is proscribed by our State and Federal Constitutions. It is the "unreasonable" arrest that is prohibited, and as the Supreme Court indicated in *Camara,* "probable cause" is the standard by which a particular decision to arrest (seizure of person) is tested against the Constitutional mandate of reasonableness.[14]

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[12] (1930) 100 Fla. 538, 120 So. 876.

[13] See footnotes 9 and 10, supra. Indeed, the Alabama Court of Appeal has recognized this requirement in *Miller v. Birmingham,* (Ala., 1969) 218 So.2d 281, notwithstanding the 1909 decision of the Alabama Supreme Court in *Kruelhaus v. Birmingham,* 164 Ala. 623, 51 So. 297, relied on by the District Court of Appeal, as has the North Carolina Court in *State v. Matthews* (1967) 270 N.C. 35, 153 S.E.2d 791, and on that basis distinguishes its own prior decisions, relied on by the District Court of Appeal, in *State v. Furmage* (1959) 250 N.C. 616, 109 S.E.2d 563.

[14] *Camara v. Municipal Court* (1967) 387 U.S. 523, 87 S.Ct. 1727 1735, 18 L.Ed.2d 930.

Unquestionably, it may be more convenient for police officers to obtain arrest warrants from clerical employees of the City, and to thereby dispense with the necessity of technical accuracy and formality required in felonies and indictable crimes, but in the absence of some showing of a compelling need, there is no valid reason why jurisdiction over the person of a citizen charged with violation of a municipal ordinance cannot be obtained by service of summons. As stated by the Supreme Court of Minnesota:

> "It occurs to us that in initiating and prosecuting charges which are misdemeanors, the grave consequences to the accused, resulting from a wrongful arrest, far outweigh the potential harm to the community in requiring something more than the peremptory issuance of a warrant by a clerk untrained in the law. The harm to an accused arrested in his home or at his place of work, the humiliation and embarrassment to his family, and the fact he had a record of arrest, however unjust, are consequences difficult to measure."[15]

The governmental interest justifying the arrest must be balanced against the constitutionally protected liberty of the private citizen, and where grounds do not exist for arrest without a warrant, that balance can only be determined by one possessing the independent discretion of a judicial officer.[16]

(C) ARTICLE II, SECTION 3, AND ARTICLE V, SECTION 1 OF THE 1968 FLORIDA CONSTITUTION PROHIBIT THE DELEGATION OF JUDICIAL

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[15] *State v. Paulick* (1967) 277 Minn. 40, 151 N.W. 2d 591; see also *State v. Simpson* (1965) 28 Wis. 2d 590, 137 N.W. 2d 391; *Caulk v. Municipal Court* (Del., 1968) 243 A.2d 7071; *French v. Superior Court* (Ind., 1969) 247 N.E. 2d 510.

[16] *Camara v. Municipal Court*, footnote 14, supra.

POWERS TO A CLERK OF COURT, CITY CLERK OR OTHER MINISTERIAL OFFICER.[17]

It has been determined that the judicial powers of Florida's Municipal Courts spring from the same organic law which created our state courts, the two being a part of the same sovereign judicial system.[18]

The question is thus presented whether the Legislature may delegate the judicial function of determining probable cause for the issuance of arrest warrants to the City Clerk for the City of Tampa.[19]

In 1935, this Court held that an act of the Legislature purporting to empower the Clerk of the Circuit Court to cancel tax certificates which he determined were void for insufficiency of the legal description of the land described therein, was an unconstitutional delegation of judicial powers, because:

> "The Legislature cannot exercise judicial functions. If it cannot exercise judicial functions, certainly it is precluded from delegating the exercise of judicial functions to ministerial officers."[20]

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[17] Article II, Section 3, Florida Constitution, 1968, provides:
"The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."
Article V, Section 1, Florida Constitution, provides:
"The judicial power of the State of Florida is vested in a Supreme Court, District Courts of Appeal, Circuit Courts, Court of Record of Escambia County, Criminal Courts of Record, County Courts, County Judges Courts, Juvenile Courts, Courts of Justices of the Peace, and such other courts, including Municipal Courts or Commissions, as the Legislature may from time to time ordain and establish."

[18] *Waller v. Florida* (1970) 397 U.S. 387 90 S.Ct. 1184, 25 L.Ed. 2d 435,

[19] Either by general statute (Section 168.04, F.S.) or by Special Act (Section 495 of the Compiled Charter of the City of Tampa, enacted by Sec. 17, Ch. 5363, Laws of Fla., 1903, derived from Ch. 4883, Laws of Florida, 1889).

[20] *Otto v. Harllee* (1935) 119 Fla. 266, 161 So. 402.

This Court has also held that the City Recorder for the City of Jacksonville, acting as Clerk of the Municipal Court for that city, was a purely ministerial officer, amenable to mandamus, to perform his duties where he sought to act independently of the Municipal Court's judgment.[21] Being a ministerial officer, a clerk of court can hardly be said to possess that degree of independence or authority required to grant or refuse a request of law enforcement officers for arrest warrants. The decision of the District Court of Appeal that the arrest warrant procedure is, at most, "quasi-judicial", implies that decisions involving human liberty are less important and do not require the same constitutional safeguards as decisions involving property rights in tax certificates.

The District Court of Appeal relied heavily on the New Jersey case of *State v. Ruotolo*, (1968) 52 N.J. 508, 247 A.2d 1, to justify its holding that the arrest warrant procedure was merely "quasi-judicial" and, therefore, need not be performed by a judicial officer. The reasoning employed by that court was that nearly one-third of all United States Commissioners are not lawyers, yet are authorized to issue arrest warrants; that policemen may, under certain conditions, arrest without a warrant; that both grand juries and petit juries are composed of non-lawyers who apply rules of law in arriving at their decisions; and that, therefore, no harm could result from allowing a deputy clerk to issue an arrest warrant. The implication inherent in such reasoning is that a judicial officer must be one learned and trained in the law. This conclusion misses the thrust of the constitutional requirements of the warrant procedure.

While legal education and training may be desirable traits in a judicial officer, they are not essential, and are by no means the distinguishing feature by which the judicial branch of government is separated from any

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[21] *State v. Almand* (Fla., 1954) 75 So.2d 905.

other branch.[22] The distinguishing feature of the judicial branch of our government is the independence and discretion it enjoys in forming its judgments.[23]

Thus, while grand juries and petit juries are composed of non-lawyers who apply rules of law in arriving at their decisions, they are a part of the judicial branch of our government, whose judgments are independent of all other branches of government,[24] and such rules of law as they do apply are received in the form of legal advice from the State's attorney, in the case of grand juries[25] or instructions from the presiding judge, in the case of petit juries.[26]

Similarly, United States Commissioners (now known as United States Magistrates) are judicial officers who not only issue arrest warrants, but issue search warrants as well, conduct preliminary hearings, and have a limited trial jurisdiction. See 28 U.S.C. 636, 18 U.S.C. 3401 et seq., and the Federal Rules of Criminal Procedure. To pursue the argument that their functions are analogous to those of the City Clerk for the City of Tampa would sanction the legislative delegation to clerical personnel of power to issue search warrants, since the function of determining probable cause to issue search warrants is the same function performed in issuing arrest warrants.[27]

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[22] Article 5, Section 13, of the Florida Constitution, requires only that justices of the Supreme Court, judges of the District Courts of Appeal, Circuit Courts and Criminal Courts of Record to be members of the Florida Bar. It is debatable whether Section 13A actually repealed the requirement that judges of the Criminal Courts of Record be members of the Florida Bar. It is optional with the Legislature whether the judges of our other courts need to be lawyers.

[23] For this reason, judges are granted immunity from civil liability for damages resulting from their actions while acting within their jurisdiction. *McDaniel v. Harrell* (1921) 81 Fla. 66, 87 So. 631.

[24] *Ryon v. Shaw* (Fla., 1955) 77 So.2d 455; *Clemmons v. State* (Fla. App. 1, 1962) 141 So.2d 749.

[25] Sec. 905.19, Florida Statutes.

[26] Sec. 918.10 (1), Florida Statutes, RCP 1.470 (b).

[27] *Giordenello v. U.S.; Wong Sun v. U.S.* and *U.S. v. Melvin*, supra footnote 6.

Finally, although it is true that police officers may arrest citizens without a warrant under certain conditions, the very necessity for the issuance of an arrest warrant presupposes a situation where the evidence is not sufficiently persuasive or judicially competent to show that type of compelling governmental interest needed to outweigh the citizen's constitutionally-protected right to liberty in the absence of such a warrant. In such a situation, an arrest may be effected only where a judicial determination of that necessity has first been made.[28]

Since a clerk of court has no judicial powers under our constitution,[29] and the Legislature is prohibited from delegating such powers to him,[30] it follows that he is incapable of that kind of independent discretion necessary to refuse the issuance of a warrant when application is made in proper form, and that those provisions of the City of Tampa Charter[31] and Section 168.04, Florida Statutes, which purport to authorize the City Clerk for the City of Tampa to issue arrest warrants are an unconstitutional delegation of judicial powers.

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[28] *Aguilar v. Texas* (1964) 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723.

[29] *Newport v. Culbreath* (1935) 120 Fla. 152, 161 So. 340.

[30] *Otto v. Harllee*, footnote 20, supra.

[31] City of Tampa Charter, Sec. 495 (Sec. 17, Ch. 5363, Law of Florida, 1903).

CONCLUSION

Both the Fourth Amendment to the United States Constitution and Article I, Section 12 of the 1968 Florida Constitution prohibit the issuance of an arrest warrant without a prior determination of probable cause which must be determined by a Judge or Magistrate, possessing independent discretion to balance the governmental need to effect an arrest against the constitutionally protected liberty of the individual, and Section 168.04, Florida Statutes, and the cited portion of the City of Tampa Charter which authorize that determination to be made by the City Clerk for the City of Tampa, as Clerk of that City's Municipal Court, are an unconstitutional delegation of judicial powers.

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IN THE SUPREME COURT OF FLORIDA

No. 40,156

GERALD SHADWICK,
Appellant,
vs.
CITY OF TAMPA,
Appellee.

APPENDIX TO APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND APPELLATE DISTRICT
OF FLORIDA

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CERTIFICATE OF SERVICE

I DO CERTIFY that a true copy of the within Appendix to Appellant's Brief has been furnished to WM. REECE SMITH, JR., and GERALD H. BEE, Attorneys for the Appellee by mail this 30th day of November, 1970.

MALORY B. FRIER
Attorney for Appellant

APPENDIX

(R 57)

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JULY TERM, A.D. 1970
Case No. 70-62

GERALD SHADWICK,
Appellant,
v.
CITY OF TAMPA,
Appellee.

Opinion filed June 24, 1970.

HOBSON, CHIEF JUDGE

Appellant was charged in Tampa Municipal Court of careless driving while his ability to drive was impaired. He had been arrested under a warrant issued in the name of the city clerk of the City of Tampa, and signed by a deputy clerk. Appellant moved to quash the warrant in the Municipal Court on the grounds that the issuance of a warrant by a city clerk was the exercise of a judicial function by a non-judicial officer, and therefore a violation of the separation of powers under Fla. Const. Art. II, Section 3 (1968), and Fla. Const. Art. V, Section 1 (1968) which vests the judicial power in the courts of the state. Appellant's motion was denied, and he petitioned the Circuit Court of Hillsborough County for a writ of common law certiorari to review the denial of his motion to quash the warrant. The petition was denied by the Circuit Court, and the appellant appealed to the Supreme Court of Florida. The Supreme Court found the matter to be within the jurisdiction of this court and transferred the case here.[1]

[1] F.A.R. 2.1 (a) (5) (d):

Appellant contends that Fla. Stat. Section 168.04 (1967),[2] and Sections 495[3] and 160.1[4] of the charter of the City of Tampa are unconstitutional insofar as they purport to vest in the city clerk the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest. These and like provisions have been dealt with before by Florida courts,[5] but the constitutionality of the procedure has not been raised in this state.

Appellant contends that the decision as to whether a warrant should issue is a judicial function and that because the legislature may not exercise judicial functions, it may not delegate judicial functions by statute to non-judicial officers. We disagree, and hold that the decision whether to issue a warrant is, at most, quasi-

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[2] FLA. STAT. SECTION 168.04 (1967): "CLERK AND MARSHALL MAY TAKE AFFIDAVITS AND ISSUE WARRANTS.

"The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaints and issue warrants for the arrest of persons complained against."

[3] LAWS OF FLA. 1903, Ch. 5363, Section 17:

"The chief of police, or any policeman of the city of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person."

[4] LAWS OF FLA. 1961, Ch. 61-2915, Section 1:

"The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court."

[5] *United States v. Melvin*, 258 F. Supp. 252 (S.D. Fla. 1966); *Headley v. State ex rel.* Bethune, 166 So.2d 479 (Fla. App. 3d 1964).

judicial and not within the "judicial power" reserved by the constitution to the judicial branch. *See generally* Florida Motor Lines v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930). E. G. Kreulhaus v. City of Birmingham, 164 Ala. 623, 51 So. 297 (1909); State v. Ruotolo, 52 N.J. 508, 247 A.2d 1 (1968); State v. Thompson, 151 S.E.2d 870 (W.Va., 1966); *cf.* State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959). *Contra,* State v. Paulick, 277 Minn. 140, 151 N.W.2d 591 (1967).

State v. Paulick, supra, relied upon heavily by appellant, dealt with the very question before this court in the case sub judice. There, the Supreme Court of Minnesota held that a statute which vested authority to issue arrest warrants in clerks of municipal courts was unconstitutional as a violation of the separation of powers. Although the court's opinion is scholarly and appealing, we chose to folow the reasoning of the Supreme Court of New Jersey in State v. Ruototo, supra. The court stated at pages 3-5:

> "With regard to the issuance of a warrant, there is no doubt that if a determination of 'probable cause' is to have any meaning, it must be made by a neutral and detached court official who is immune from 'the often competitive enterprise of ferreting out crime.' Johnson v. United States, supra, 333 U.S. at 14, 68 S.Ct. at 369, 92 L.Ed. at 440."
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> * * * * *
>
> "A finding of neutrality, however, goes only part of the way to justify the challenged procedure. Before a deputy clerk is constitutionally permitted to determine whether the facts as alleged by the complainant constitute probable cause that an offense has been committed and that the defendant is the culprit, we must ask? Is the deputy clerk qualified to exercise the necessary judgment?"
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> * * * * *

"(W)e believe that background in the law, although desirable, is not a requirement imposed by the Constitution on a determination of probable cause. After all, probable cause (sic) is a standard which is designed to be applied by laymen. A policeman may make an arrest without a warrant where there is probable cause, i.e., where there are facts which would lead 'a man of reasonable caution' to believe a crime has been or is being committed."

* * * * *

"Throughout the history of this country laymen have served in various judicial capacities, and particularly in order to determine the existence of probable cause. United States Commissioners, appointed by the United States District Courts, have been invested with the power to issue arrest warrants in federal prosecutions. Fed. Rules Crim. Procedure 3, 4. Today, almost one-third of the United States commissioners are laymen. See Staff Memorandum, Sub-committee on Improvements in Judicial Machinery; reported in Hearings, Senate Judiciary Committee, Federal Magistrates Act, 1967, p. 30. A grand jury, from which lawyers are routinely excluded, applies the standard of probable cause in determining whether to return an indictment. Grand jurors and petit jurors apply sundry rules of law to factual complexes; our jury system rests upon the premise that one need not be a lawyer to understand guiding principles and to make judgments in the light of them."

We feel that the emphasis should not be placed upon fine distinctions between judicial officers and non-judicial officers, but instead upon the requirement that the person who issues the warrant be neutral and disinterested, and that such person make a finding of probable cause before issuing a warrant. We see no evidence that the city clerk is unalterably aligned with the forces

of law enforcement[6] and therefore he may fulfill the role of the neutral person which the constitution requires to be placed between the police and the public.

Appellant argues that the city, by allowing the clerk to issue arrest warrants, was providing nothing more than a "rubber stamp" for the police. If this were the case, it would be clearly unacceptable. However, there is nothing in the record to substantiate this allegation.

For the reasons stated, we hold the challenged statutes constitutional and the order appealed is

AFFIRMED.

LILES and McNULTY, JJ., CONCUR.

Chapter 24

POLICE DEPARTMENT*

Sec. 494. Powers of mayor 1903 Charter; organization of police force.

The duties of the mayor shall be to see that all the ordinances of the city council are faithfully executed, and he is authorized by and with the consent of the city council to organize and appoint such police force as shall be necessary to insure peace and good order of the city and the observance of law within the municipal limits. He shall have power to appoint by and with the consent of the city council, all officers of the city who are not made elective by this charter. He shall have the power to bid in all property for the city at any and all judicial sales, or sales under process of law, where the city is a party; to make pro tempore appointments to fill vacancies caused by death, sickness, absence or other

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[6] *E.g.* State v. Mathews, 270 N.C. 35, 153 S.E.2d 791 (1967); State ex rel. White v. Simson, 28 Wis. 2d 590, 137 N.W.2d 391 (1965).

disability of any city officer, but he shall not have the power to fill vacancies in the members of the board of commissioners of public works or of the city council. (Ch. 4883, Laws of Florida 1899; Ch. 5363, § 7, Laws of Florida 1903).

Sec. 495. Arrest with and without warrant.

The chief of police, or any policeman of the City of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, where-upon said judge or clerk shall issue a warrant for the arrest of such person. (Ch. 4883, Laws of Florida 1889; Ch. 5363, § 17, Laws of Florida 1903)*

Sec. 159. City clerk—Election; term; clerk of board; ex-officio clerk of court; bond; compensation.

There shall be elected by the qualified electors of the City of Tampa a city clerk, who shall hold office for four years. He shall be the clerk of the board of representatives*, and shall act as ex-officio clerk of the municipal court. The clerk shall give such bond as the board of representatives* may fix, and shall perform all the duties now or hereafter imposed upon him by law or ordinance not inconsistent with the provisions of this revised charter. The city clerk shall be paid as compensation for his services the sum of $3,600.00 per year, payable in monthly installments. (Rev. Char., § 22, 1927)

Editor's note—The salary of the city clerk was $6000 as fixed by § 160 (see § 160.01).

*Cross references—For the creation of a police department, see § 142; for the designation of the duties of the police department and the chief of police, see § 143; for the designation of the duties of the chief of police, see § 153.

Sec. 160. Same—Salary, 1957.

That beginning October 1, 1957, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of the city clerk of the City of Tampa, shall be six thousand dollars ($6,000.00) per annum, payable in equal monthly installments in the manner and form as now provided by law. (Sp. Acts Ch. 57-1908, § 1)

Editor's note—The salary of the clerk as established in the year 1949 is contained in § 161 and § 393.

Sec. 160.01. Same—Salary, 1965.

Beginning October 1, 1965, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of the city clerk of the City of Tampa shall be seven thousand five hundred dollars ($7,500.00) per annum, payable in equal monthly installments in the manner and form as now provided by law. (Sp. Acts, Ch. 65-2301, § 1)

Editor's note—Sec. Sec. 160.01, derived from Ch. 65-2301, § 1, as included herein supersedes the provisions regarding the city clerk's salary contained in previous enactments, as compiled in §§ 159, 160, 161, and 393.

*Editor's note—Sec. 41.1 changed the designation of the governing body to city council.

Sec. 160.02. Same—Salary, 1969.

The salary of the clerk in all cities having a population in excess of two hundred thousand (200,000) in all counties having a population of not less than three hundred ninety thousand (390,000) nor more than four hundred fifty thousand (450,000) according to the latest official decennial census is fixed and prescribed at the sum of nine thousand [dollars] ($9,000.00) per annum, payable in equal monthly installments. (Gen. Laws, Ch. 69-690, § 2)

Editor's note—Sec. 160.02, derived from Ch. 69-690, § 2, as included herein, supersedes §§ 159, 160, 160.01, 161 and 393 pertaining to the salary of the city clerk.

Sec. 160.1. Same—Appointment of deputies; powers.

The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy of deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court. (Sp. Acts, Ch. 61-2915, § 1)

Cross reference—Sec. 415 empowers the city to make provision for a clerk of the municipal court.

Sec. 161. Salaries of mayor, clerk and attorney.

That beginning October 1, 1949, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of each of the officers of the City of Tampa, Florida, hereinafter enumerated shall be in the following amounts per annum:

Mayor	$10,000.00

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE No. 40,156

GERALD SHADWICK,
Appellant,
vs.
CITY OF TAMPA,
Appellee.

APPELLANT'S REPLY BRIEF

STATEMENT OF THE CASE.

The parties will be referred to in this reply brief as they were in the Appellant's main brief, that is "Appellant" and "Appellee". The Appellant submits that the Statement of the Case and the Facts of this Case were sufficiently stated in his main brief and requires nothing further in this regard.

STATEMENT OF POINTS

I REPLY TO APPELLEE'S FIRST POINT THE ARREST WARRANT PROCEDURE IS A STRICTLY JUDICIAL FUNCTION WHICH BECAUSE OF ITS ESSENTIAL NATURE REQUIRING A DETERMINATION OF PROBABLE CAUSE NECESSARY TO THE ASSUMPTION OF JURISDICTION BY THE COURT ISSUING THE SAME AND POSSESSING THE ATTRIBUTE OF AUTHORIZING SEARCHES AND SEIZURES INCIDENT THERETO, MAY NOT BE DELEGATED BY SPECIAL OR GENERAL LAW TO A CLERK OF COURT AS A QUASI-JUDICIAL FUNCTION UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARICLE I, SECTION 12, ARTICLE II, SECTION 3 AND ARTICLE V, SECTION 1 OF THE FLORIDA CONSTITUTION.

II REPLY TO APPELLEE'S SECOND POINT THE TERM "MAGISTRATES" AS USED BY THE UNITED STATES SUPREME COURT INTERPRETING THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO REQUIRE THAT ARREST AND SEARCH WARRANTS BE ISSUED BY "NEUTRAL AND DETACHED MAGISTRATES" IS NOT SYNONYMOUS WITH THE TERM "MAGISTRATE" AS USED IN THE FEDERAL EXTRADITION STATUTE, REQUIRING THAT REQUISITIONS IN EXTRADITION PROCEEDINGS BE SUPPORTED BY "INFORMATION FOUND OR AFFIDAVIT MADE BEFORE A MAGISTRATE."

ARGUMENT

I REPLY TO APPELLEE'S FIRST POINT THE ARREST WARRANT PROCEDURE IS A STRICTLY JUDICIAL FUNCTION WHICH BECAUSE OF ITS ESSENTIAL NATURE REQUIRING A DETERMINATION OF PROBABLE CAUSE NECESSARY TO THE ASSUMPTION OF JURISDICTION BY THE COURT ISSUING THE SAME AND POSSESSING THE ATTRIBUTE OF AUTHORIZING SEARCHES AND SEIZURES INCIDENT THERETO, MAY NOT BE DELEGATED BY SPECIAL OR GENERAL LAW TO A CLERK OF COURT AS A QUASI-JUDICIAL FUNCTION UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARICLE I, SECTION 12, ARTICLE II, SECTION 3 AND ARTICLE V, SECTION 1 OF THE FLORIDA CONSTITUTION.

Appellee's first point (and the District Court's decision) asserts that special and general laws authori-

zing Clerks of Municipal Courts to issue arrest warrants do not violate Constitutional prohibitions against delegation of judicial powers because the arrest warrant procedure, including the making of decisions as to the existence of probable cause, is merely "quasi-judicial". This seems to infer that Municipal Courts are not Courts of law because the phrase "quasi-judicial" is employed to describe activities which, although judicial in nature, "occurs other than in a Court of law."[1]

Thus, "quasi-judicial" functions of government may be conferred upon and exercised or performed by permissible administrative agencies when direct or immediate or continuing judicial action is inxepedient or impracticable, and do not involve any essential judicial powers.[2]

Although the decisions of Lower Courts, as well as those of quasi-judicial bodies may both be reviewed by Certiorari, the scope of review in the case of quasi-judicial bodies is considerably broader than that afforded to decisions of Lower Courts,[3] and, on at least one occasion, mandamus was held to be the proper remedy to review a quasi-judicial decision,[4] although it is elementary that a strictly judicial decision is not subject to review by mandamus.[5]

Although the Appellee (and the District Court of Appeal) cite *Florida Motor Lines vs. Railroad Commossioners*[6] as authority for the proposition that quasi-ju-

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[1] *Modlin vs. City of Miami Beach,* (Fla. 1967) 201 So.2d 70, 74.

[2] *McRae vs. Robbins,* 151 Fla. 109, 9 So.2d 284, 390 (1942).

[3] *Wilson vs. McCoy Mfg. Co.,* (Fla. 1954) 69 So.2d 659.

[4] *Nelson vs. Lindsey,* 151 Fla. 596, 10 So.2d 1313 (1942).

[5] *State ex rel Kaufman vs. Sutton,* Fla. App. 3, 1970) 231 So.2d 874; *United States vs. Lawrence,* 3 Dall. 42, 3 U.S. 42, 1 L.Ed. 502 (1795).

[6] *Florida Motor Lines vs. Railroad Commissioners,* 100 Fla. 538, 129 So. 876 (1930).

dicial functions do not embrace strictly judicial activities which are restricted to the Courts enumerated in the judicial article of our Constitution, both the Appellee and the District Court of Appeal overlooked or failed to consider the limitations imposed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the 1968 Florida Constitution on the types o judicial activities which may be designated as "quasi-judicial" as distinguished from those which are strictly judicial. As this Court stated in that case:

> "Whether a function is judicial or quasi-judicial must be determined from its essential nature and attributes and the law applicable thereto."[7]

Thus, the administrative procedures of the Florida Railroad Commissioners for deciding whther to grant, modify or deny certificates of ppublic convenience and necessity to common carriers was held in that case to not constitute a function which from its essential nature and attributes could only be performed by a Court.

It is thus necessary to examine the essential nature and attributes of the arrest warrant procedure to determine whether, from the law, it is such a function which need not be performed by a Court.

First, it must be borne in mind that an arrest warrant is, in effect, an authorization to search since every lawful arrest authorizes, as an incident thereto, a search of the person arrested and "the area within which he might gain possession of a weapon or destructible evidence."[8] Thus one attribute of the arrest warrant pro-

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[7] Ibid at 129 So. 882.

[8] *Chimel vs. California*, 395 U.S. 752, 89 So.Ct. 2034, 23 L.Ed. 2d 685 (1969); c.f. *State vs. O'Steen*, (Fla. App.; 1970) 238 So.2d 434; and cases cited therein.

cedure, is the incidental search which the arrest entails, which, although restricted as to the area to be searched, is broader in the respect that no specific location or items to be searched for must be enumerated in the affidavit or warrant.

Appellee also cites *State ex rel Melson vs. Peeler*[9] and *Ocampo vs. United States*[10] to support its argument that determinations of probable cause are not exclusively judicial functions whose exercise must be restricted to the Courts. Neither of these cases however, dealt with the Constitutional limitations on arrest contained in the Fourth and Fourteenth Amendments to the United States Constitution or Article I, Section 12 of the Florida Constitution. *Ocampo* did hold that certain provisions contained in the Manila Charter authorizing the prosecuting attorney to conduct preliminary investigations and file information for prosecution under the criminal laws of the Phillippine Islands did not violate the Phillipine Bill of Rights but it should be pointed out that the informations were required to be sworn to before the Judge of the Court of First Instance who thereupon issued the arrest warrant. Although the Court's opinion did not make it clear whether the Judge of the Court of First Instance held any discretion to refuse to issue the arrest warrant it does appear that the act in question reserved to the Court of First Instance the ower to "make such summary investigation into the case as it may deem ncessary to enable it to fix bail or determine whether the offense is bailable" and it should not be presumed that the Judge's action in issuing the arrest warrant was ministerial.[11]

Melson merely held that the limitation of prosecution statute in Florida was tolled by the filing of an information in the Court having jurisdiction of the of-

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[9] *State ex rel Melson vs. Peeler,* 107 Fla. 615, 146 So. 188 (1933).

[10] *Ocampo vs. United States,* 234 U.S. 91, 34 S.Ct. 712, 582, L.Ed. 1231 (1913).

[11] *United States vs. Lawrence,* 3 Dall. 42, 3 U.S. 42, 1 L.Ed.

fense charged and since that act constituted the institution of a criminal prosecution the issuance of a capias thereon by the Clerk of the Court was purely a ministerial act, the validity of which was not questioned. Although *Melson* is clearly inapplicable it is believed that Appellee intended to assert that case for the principle stated in *Hall vs. State*[12] where the Court referred the duties of a State Attorney requiring an examination of evidence and the determination of questions of law and fact before taking action thereon by filing an information as being "quasi-judicial" or discretionary in character. However the Court there recognized that the power of a State Attorney to perform such functions was expressly sanctioned by our Constitution.[13] The act performed by a prosecuting attorney in filing an information charging the commission of a criminal offense with the Court having jurisdiction over that offense serves the same purpose as that of a magistrate in determining probable cause for the issuancce of an arrest warrant since both activities confer jurisdiction upon the Courts.[14] Whereas jurisdiction may be conferred upon a Court in a particular criminal prosecution where the prosecuting attorney for the Court filed an information therein, the determination of probable cause is necessary to the existence of the magistrate's jurisdiction to issue the arrest warrant. Thus, the assumption of jurisdiction is a second attribute of the arrest warrant procedure, the essential nature of which is strictly judicial and may not be exercised by or delegated to Clerks of Court.[15]

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[12] *Hall vs. State*, 136 Fla. 644, 187 So. 392 (1939).

[13] Article I, Section 15, Florida Constitution of 1968 formerly Section 10, Declaration of Rights, 1885 Florida Constitution.

[14] *Sullivan vs. State* (Fla. 1951) 49 So.2d 794.

[15] *Newport vs. Culbreath*, 120 Fla. 152, 161 So. 340 (1935); *Otto vs. Harllee*, 119 Fla. 266, 161 So. 402 (1935).

II REPLY TO APPELLEE'S SECOND POINT

THE TERM "MAGISTRATE" AS USED BY THE UNITED STATES SUPREME COURT INTERPRETING THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO REQUIRE THAT ARREST AND SEARCH WARRANTS BE ISSUED BY "NEUTRAL AND DETACHED MAGISTRATES" IS NOT SYNONYMOUS WITH THE TERM "MAGISTRATES", AS USED IN THE FEDERAL EXTRADITION STATUTE, REQUIRING THAT REQUISITIONS IN EXTRADITION PROCEEDINGS BE SUPPORTED BY "INFORMATION FOUND OR AFFIDAVIT MADE BEFORE A MAGISTRATE."

Appellee also asserts that a Clerk of the Municipal Court is a neutral and detached "magistrate" within the intendment of certain United States Supreme Court decisions requiring that determinations of probable cause for the issuance of arrest warrants be made by a neutral and detached magistrate under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution, because that Court and this Court have both upheld interstate extradition proceedings under a Federal Statute requiring the requisition of the demanding state to be supported by "an indictment found or an affidavit made before a magistrate" of the demanding state, charging the commission of a crime by the person sought to be extradited where the requisition was supported by affidavits executed before a Georgia notary public[16] and a deputy clerk of the City of Rochester, New York.[17]

However, an examination of those decisions reveals

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[16] *Compton vs. Alabama*, 214 U.S. 1, 29 S.Ct. 605, 53 L.Ed. 885 (1909).

[17] *State ex rel Miller vs. McLeod*, 142 Fla. 254, 194 So. 628 (1940).

that the constitutional question raised in this proceeding were neither raised nor decided in those cases, the sole question in each case being the proper construction and application of the federal extradition statute.

In the latter case (*State ex rel vs. McLeod*),[18] the Florida Supreme Court quoted the New York statute which authorized the Clerk to "take information upon which warrants for the arrest of persons charged with the commission of a crime or the violation of an ordinance, *may be issued by the City Judges* * * * * *" (emphasis supplied) The Court then noted:

> "It is important to note at this point that on the same day the affidavit was made before the deputy clerk of the City of Rochester, Criminal Branch, Plaintiff in error had committed an offense, the Judge of said Court signed a warrant for the arrest of Plaintiff in error tested in the name of the 'People of the State of New York' addressed to any 'Peace Officer in the State of New York' and, reciting that 'Information upon oath had been laid before him of the crime' and accusing Charles E. Miller (Plaintiff in error) thereof'."[19]

Thus, for purposes of construing and applying the federal extradition statute, that decision held, in efffect, that the mere ministerial act of administering the oath to an affidavit for an arrest warrant was all that was required by the federal statute, there being no requirement in the statute that the magistrate decide any questions of law or fact before performing the act.

In *Compton vs. Alabama*,[20] on the other hand, the Supreme Court of the United States pointed out that under Georgia law in effect at that time, notaries public were "ex-officio justices of the peace" who were re-

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[18]See note 17 supra.

[19]At 194 So. 630.

[20]See note 16 supra.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 40,156

GERALD SHADWICK,
Appellant,
vs.
CITY OF TAMPA,
Appellee.

APPELLEE'S BRIEF

STATEMENT OF THE CASE

This is an appeal from a Final Judgment from the District Court of Appeal, Second District, reported as Shadwick v. City of Tampa, 237 So.2d 231 (2d D.C.A., Fla., 1970). The Appellant was the Appellant below and Appellee was Appellee. In this brief the parties will be referred to as they stand in this Court, Appellant and Appellee, respectively.

The following symbols will be used:

"R" for Record-on-Appeal
"A" for Appendix of Appellee.

The cause was commenced when the Appellant was arrested and charged with "careless driving while drinking" on March 6, 1969, in the City of Tampa, Hillsborough County, Florida, in violation of Section 36-89 (b), City of Tampa Code (R-1 thru 5). The Appellant filed his Motion to Quash Warrant on March 13, 1969, in the Municipal Court of the City of Tampa (R-6 and 7) and subsequently, on April 18, 1969, an Order was entered denying said Motion (R-8). Appellant on April 23, 1969, filed Petition for Writ of Certiorari in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, (R-1 thru 3) and on

July 23, 1969, the Honorable Neil C. McMullen, Circuit Judge, entered an Order Denying Writ of Certiorari (R-9).

From this Order (R-9), Appellant on August 21, 1969, timely filed his Notice of Appeal (R-10) to the Supreme Court of Florida which found the matter to be within the jurisdiction of the District Court of Appeal, Second District, and transferred the case there.

Subsequently, after oral argument the Second District Court of Appeal filed its Opinion on June 24, 1970, holding the challenged statutes constitutional and affirming the Order on appeal (R-57 thru 61).

After entry of an Order Denying Re-Hearing (R-66), Appelant on August 24, 1970, timey filed his Notice of Appeal in this Court invoking its jurisdiction under Article 5, Section 4 (2), Florida Constitution (1968).

The challenged decision of the Second District of Appeal (R-57 thru 61) is made a part of this Brief in the Appendix attached hereto (A-5).

POINTS INVOLVED

I. THE DECISION ON APPEAL (R-57 thru 61) SHOULD BE AFFIRMED AND ADOPTED BECAUSE SPECIAL AND GENERAL LAWS PERTAINING TO DUTIES OF CLERKS OF THE MUNICIPAL COURT TO ISSUE ARREST WARRANTS ARE CONSTITUTIONAL DELEGATION OF A QUASI-JUDICIAL POWER WHICH IMPLIES THE POWER TO DETERMINE PROBABLE CAUSE. Art. 1, Sec. 12; Art. 2, Sec. 3; Art. 3, Sec. 11(a)(1); Art. 5, Sec. 1, Fla. Const. (1968); 4th and 14th Amend., U.S. Const. (raised by Appellant's Assignment of Errors No. 1 and 2 (R-67), and Appellant's Brief, Points 1(A)(B) and (C)).

II. THE DECISION ON APPEAL (R-57 thru 61) SHOULD BE AFFIRMED AND ADOPTED BECAUSE A CLERK OR DEPUTY CLERK OF THE MUNICIPAL COURT OF THE CITY OF TAMPA IS A NEUTRAL AND DETACHED "MAGISTRATE" WITHIN THE REQUIREMENTS OF THE 4TH AND 14TH AMEND., U.S. CONST., AND ART. 1, SEC. 12, FLA. CONST., BY VIRTUE OF THE FLORIDA LAWS FIXING THEIR POWERS AND DUTIES TO ISSUE ARREST WARRANTS. Fla. Stat. Sec. 168.04(1967) and Secs. 495, 160.1, and 5(d), Charter of the City of Tampa (A-1 thru 4), (raised by Appelant's Brief, Points I(a)(b) and (c).)

STATEMENT OF THE FACTS

Due to the nature of the points involved, there are no factual matters requiring determination on this Appeal.

ARGUMENT

POINT I

THE DECISION ON APPEAL (R-57 thru 61) SHOULD BE AFFIRMED AND ADOPTED BECAUSE SPECIAL AND GENERAL LAWS PERTAINING TO DUTIES OF CLERKS OF THE MUNICIPAL COURT TO ISSUE ARREST WARRANTS ARE CONSTITUTIONAL DELEGATION OF A QUASI-JUDICIAL POWER WHICH IMPLIES THE POWER TO DETERMINE PROBABL CAUSE. Art. 1, Sec. 12; Art. 2, Sec. 3; Art. 3, Sec. 11(a)(1); Art. 5, Sec. 1, Fla. Const. (1968); 4th and 14th Amend., U.S. Const. (Raised by Appellant's Assignment of Errors No. 1 and 2 (R-67), and Appellant's Brief, Points 1(A)(B) and (C).)

The points raised in Appellant's Brief are not in harmony with the issues raised and decided in the decis-

ion on Appeal (R-57 thru 61). Briefly summarizing that decision, the Court held that Fla. Stat. Sec. 168.04 (1967), and Secs. 495 and 160.1 of the Charter of the City of Tampa are constitutional ". . . in so far as they purport to vest in the City Clerk the power to issue Arrest Warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest." (R-58). The lower Court further held that ". . . the decision whether to issue a Warrant is, at most, quasi-judicial and not within the 'judicial power' reserved by the Constitution to the judicial branch." (R-59).

Any implication in Appellant's Brief that the lower Court has departed from the numerous federal constitutional requirements cited by the Appellant, or that the lower Court ignored the issue of "probable cause" is quickly dispelled by the requirement ". . . that the person who issues the Warrant be neutral and disinterested, and that such person make a finding of probable cause before issuing a Warrant." (R-61).

The Constitution of the State of Florida provides that special laws or general laws of local application may be passed by the Legislature pertaining to duties of municipal officers. Article III, Sec. 11(a)(1), Fla. Const. (1968). This power of the Legislature to pass laws fixing the duties of municipal officers is not substantially changed from that which existed under Art. 3, Sec. 20, Fla. Const. (1885).

By virtue of this constitutional power, the Legislature enacted the following special laws pertaining to the duties of Clerks and Deputy Clerks of the Municipal Court in the City of Tampa and incorporated in the Charter of the City of Tampa, Sec. 495 and Sec. 160.1.

"Sec. 495—Arrest with and without Warrant.

The Chief of Police, or any policeman of the City of Tampa may arrest, without warrant, any person violating any of the ordinances of said City,

committed in the presence of such officer, and when knowledge of the violation of any ordinance of said City shall come to said Chief of Police or policeman, not committed in his presence, he shall, at once make affidavit, before the Judge or *Clerk of the Municipal Court,* against the person charged with such violation, whereupon said Judge or *Clerk shall issue a Warrant for the arrest of such person.*" Laws of Fla. 1903, Ch. 5363, Sec. 17 (A-1). Emphasis supplied.

"Sec. 160.1—Same, Appointment of Deputies; Powers.

The City Clerk of the City of Tampa, with the approval of the Mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the City Civil Service, *and to have and exercise the same powers as the City Clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as Clerks of the Municipal Courts.*" Laws of Fla., 1961, Ch. 61-2915, Sec. 1(A-2 and 3). Emphasis supplied.

The aforementioned powers of the Clerk of the Municipal Court, or his deputies, are not incompatible or in conflict with the general laws of the State of Florida. Fla. Stat. Sec. 168.04 (1967); *Headley v. State,* 166 So.2d 479 (3rd D.C.A. Fla. 1964). In fact, it is the duty of the officers of the City of Tampa to exercise the powers granted to them by virtue of the general laws of the State of Florida. Sec. 5(d), Ch. of the City of Tampa (A-4).

The Appellant is apparently concerned that the Clerk or Deputy Clerk of the Municipal Court is not a judicial officer such as could perform the duties of determining probable cause or act as a neutral and detatched magistrate in the exercise of a judicial discretion to determine the existence of probable cause. However, the function of determining whether probable

cause exists for an arrest is only quasi-judicial and need not be confined to strictly judicial officers. *State v. Furmage,* 109 SE2d 563, 570 (Sup. Ct. N.C., 1959); *Ocampo v. U. S.,* 243 U.S. 91, 58 L. Ed. 1231, 34 S. Ct. 712.

After discussing the various powers of a Solicitor and the fact that the Legislature may grant quasi-judicial powers, the Court in *State v. Furmage,* supra, quoted from *Ocampo v. U.S.,* supra, as follows:

> "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function . . . as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, and only entitled the accused to his liberty for the present, leaving him subject to re-arrest. . . . *In short, the function of determining that probable cause exists for the arrest of a person accused is only quasi-judicial and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal.*" Id. 109 S.E.2d 570, emphasis supplied.

Although the case of *State v. Furmage,* supra, involved the powers of a Solicitor, the Court recognized that the Legislature may pass laws authorizing Clerks to issue arrest warrants even though this function may be judicial or quasi-judicial because such a determination is in no sense a final adjudication. Id. 109 S.E.2d 570.

The power to issue warrants of arrest necessarily implies the power to hear and determine the issue of probable cause. Id. 109 S. E.2d at page 566.

A statute which confers the powers to issue arrest warrants by a Clerk or Deputy Clerk of a Municipal Court is not an unconstitutional exercise or delegation

of "judicial power" and conforms to the requirement of the 4th and 14th Amendment to the Constitution of the United States. See generally *Florida Motor Lines v. Railroad Commissioners,* 100 Fla. 538, 129 So. 876 (1930). *E.g. Kreulhaus v. City of Birmingham,* 164 Ala. 623, 51 So. 297 (1909); *State v. Ruotolo,* 52 N.J. 508, 247 A.2d 1 (1968); *State v. Thompson,* 151 S.E.2d 870 (W.Va. 1966); *c f. State v. Furmage,* 250 N.C. 616, 109 S.E.2d 563 (1959). *Contra, State v. Paulick,* 277 Minn. 140, 151 N.W.2d 591 (1967).

Furthermore, such statutes are not an unconstitutional delegation of judicial power because it was certainly not the intent of framers of our Constitution to deny the Legislature this specific grant of power. This specific grant of power to the Legislature to pass these special laws (A-1, 2 and 3) is conferred by Art. 3, Sec. 11 (a) (1), Fla. Const. 1968) as formerly contained in Art. 3, Sec. 20 Fla. Const. (1885). The delegation by the Legislature of this quasi-judicial power to the Clerk and Deputy Clerks of the Municipal Court of the City of Tampa does not impose upon the "judicial power" of the State of Florida vested in the various courts enumerated in Art. 5, Sec. 1, Fla. Const. (1968) or violate the "separation of powers clause" under Art. 2, Sec. 3, Fla. Const. (1968). Where a statute confers quasi-judicial duty it is not an illegal delegation of "judicial powers" or violate the "separation of powers clause". *Florida Motor Lines v. Railroad Commissioners,* supra; *Nelson v. Lindsey,* 151 Fla. 596, 10 So.2d 131, 134 (Sup. Ct. Fla. 1942).

The general law on the issue before the Court is as follows:

> "When so provided by statute, the authority to issue warrants may be vested in officers whose other duties are purely ministerial, such as *clerks,* . . ." Emphasis supplied; 22 C.J.S., Sec. 318, at page 820-821; *State ex. rel. Melson v. Peeler,* 107 Fla. 615, 146 So. 188 (Sup. Ct. Fla. 1933). Also see, 22 C.J.S. Sec. 318, 1970 Supp. Citing *Miller v. U.S.* 354 F.2d 801 (8 C.C.A. Mo. 1966).

"A Clerk of Court may not exercise judicial power except by constitutional or legislative provision, and then only in accordance with strict language of the provision." *15 Am. Jur.2d,* Clerks of Court, Sec. 22.

"Certain acts, although partially judicial in nature, may be performed by the Clerk of the Court. A familiar example is the power *to issue warrants of arrest."* Emphasis supplied. *15 Am. Jur.2d,* Clerks of Court, Sec. 22.

In conclusion, the Appellee adopts, as part of this Brief, the decision on appeal (R-57 thru 61) as officially reported in the case of *Shadwick v. City of Tampa,* 237 So.2d 231 (2d D.C.A. Fla. 1970) and, further, respectfully shows the Court that the Constitution of the State of Florida provides that special laws or general laws of local application, such as are here involved, may be passed by the Legislature pertaining to the duties of municipal officers. The Legislature by these laws has provided that the Clerk or Deputy Clerk of the Municipal Court shall issue arrest warrants in the City of Tampa (A-1, 2 and 3) . The power to issue warrants of arrest implies the power to determine probable cause. In the exercise of this quasi-judicial duty or power, the Deputy Clerk of the Municipal Court properly issued an arrest warrant (R-5) after obtaining a Complaint-Affidavit from the police officer (R-4).

The Clerk and Deputy Clerks of the Municipal Court of the City of Tampa are not police officers exercising a dual function of active law enforcement on the street and also issuing arrest warrants upon probable cause. They are appointed officers under the City Clerk of the City of Tampa vested with the powers of the City Clerk (A-2, 3).

WHEREFORE, Appellee prays this Court to affirm and adopt the decision on appeal (R-57 thru 61).

ARGUMENT

POINT II

THE DECISION ON APPEAL (R-57 thru 61) SHOULD BE AFFIRMED AND ADOPTED BECAUSE A CLERK OR DEPUTY CLERK OF THE MUNICIPAL COURT OF THE CITY OF TAMPA IS A NEUTRAL AND DETACHED "MAGISTRATE" WITHIN THE REQUIREMENTS OF THE 4TH AND 14TH AMEND., U. S. CONSTITUTION AND ART. 1, SEC. 12, FLA. CONSTITUTION, BY VIRTUE OF THE FLORIDA LAWS FIXING THEIR POWERS AND DUTIES TO ISSUE ARREST WARRANTS. Fla. Stat. Sec. 168.04 (1967) and Secs. 495, 160.1, and 5(d), Charter of the City of Tampa (A-1 thru 4). (raised by Appellant's Brief, Points I(a) (b) and (c).)

The Appellant raised a vexing question, unexplained, whether in the realm of a constitutional warrant procedure, can a Clerk or Deputy Clerk of a Municipal Court be a "magistrate."

There is no question that a constitutional warrant procedure requires that inferences from facts which lead to the Complaint ". . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Giordenello v. U.S.*, 357 U.S. 480, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503 (1958); *Johnson v. U.S.*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948); *U.S. v. Lefkowicz*, 285 U.S. 452, 464, 52 S.Ct. 420, 423, 76 L.Ed. 877, 82 A.L.R. 775; *U.S. v. Kirschenblatt*, 16 F.2d 202, 203, 51 A.L.R. 416 (2d C.C.A. 1926); 4th and 14th Amend., U.S. Const.; Art. 1, Sec. 12, Fla. Const., (1968).

The Supreme Court of the United States has given the word "magistrate" a broad meaning. In a general sense a magistrate is a public civil officer, possessing

such power, legislative, executive, or judicial, as the government appointing him may ordain; though in a narrow sense he is regarded as an inferior judicial officer. 9 A, *U. S. Supreme Court Digest, Lawyers Addition,* Justice of the Peace, Sec. 1 at page 184 (1970 Edition); *J. D. Compton v. State of Alabama,* 214 U.S. 1, 29 S.Ct. 605, 607, 53 L.Ed. 885 (1909), where a notary public was held to be a "magistrate" to issue an extradition warrant by a Governor.

Mr. Justice Storey said: "I know of no other definition of the term 'magistrate' than that he is a person clothed with power as a public civil officer." *Compton v. State of Alabama,* supra, at page 607.

In the federal system, Clerks of Municipal Court clothed with authority under State Statutes to issue arrest warrants are considered to be "magistrates." See generally, *State v. Ruotolo,* 52 N.J. 508, 247 A.2d 1, 5 (1968) footnote No. 4, citing *State ex rel Miller v. McLeod,* 142 Fla. 254, 194 So. 628, 630 (Sup. Ct. Fla. 1940).

Other definitions of a "magistrate" are contained in the following:

> "A person clothed with power as a public civil officer; a public civil officer invested with executive or judicial powers; . . ." *Webster's New International Dictionary, Second Edition,* unabridged.

> "A Federal Law requiring an Affidavit to be sworn to before a magistrate, is complied with when 'sworn to before me, J.M., Clerk of the Municipal Court,' it being presumed that it was taken in the Court; *In re Keller,* 36 Fed. 684; as used in U.S.R.S., Sec. 5278 (extradition proceedings); it includes an assistant police magistrate of a City; *Kurtz v. State,* 22 Fla. 36 1 Am. St. Rep. 173." *Volume 2 Bouvier's Law Dictionary,* 3rd Edition (1914).

quired to "keep separate dockets of all civil and criminal cases disposed of by them."

These decisions and others, involving application of the federal extradition statute, must be read in light of the earlier pronouncement of the United States Supreme Court in *United States vs. Lawrence*[21] where that Court refused to mandamus a United States District Judge to issue an arrest warrant because his actions were performed in a judicial capacity when he determined that the evidence was not sufficient to authorize the issuance of the warrant.

To say that a Municipal Court Clerk or deputy clerk is a magistrate possessed of discretionary powers in the arrest warrant procedure because he may be deemed a magistrate having the ministerial duties of administering oaths in connection with the issuance of such a warrant by one who is possessed of such discretionary powers, is to ignore the principle stated in *Florida Motor Lines vs. Railroad Commissioners,*[22] cited by both the Appellee and the District Court of Appeal, that it is the nature of the act to be performed, rather than the name of the official who performed it, that determines whether the act is judicial or otherwise.

CONCLUSION

The Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the 1968 Florida Constitution, require that before an arrest warrant may issue, a determination be made that probable cause exists to believe the accused person has committed a specific crime. This determination involves questions of law and fact, the resolution of which permits drawing inferences from evidence which is judi-

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[21] *United States vs. Lawrence,* 3 Dall. 42, 3 U.S. 42, 1 L.Ed. 502 (1795).

[22] *Florida Motor Lines vs. Railroad Commissioners,* 100 Fla. 538, 129 So. 876 (1930).

cially less competent than that required to sanction an arrest without a warrant, and must therefore be made by a neutral and detached magistrate in the exercise of discretionary or judicial power as opposed to the performance of purely ministerial or executive duties. The existance of probable cause is necessary to the assumption of jurisdiction by the Court issuing the warrant so that one attribute of the determination of its existence, is a determination of the Court's jurisdiction. Another attribute of the arrest warrant procedure is the search and seizure incident to the execution of the warrant by arrest.

The essential nature of both attributes require that the decision making function (the determination of probable cause) be performed by an officer possessed of strictly judicial power and preclude its exercise by, or delegation to, a quasi-judicial officer, much less a ministerial officer. Accordingly, both special and general laws purporting to vest these powers in a clerk or deputy clerk of the Municipal Court are unconstitutional delegations of judicial power under the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Section 12 of the Florida Constitution, and the separation of power clause (Article II, Section 3) and Article V, Section 1 of the Florida Constitution vesting the judicial power of the state in certain Courts.

MALORY B. FRIER
Attorney for Appellant
1809 North Howard Avenue
Tampa, Florida 33607

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing APPELLANT'S REPLY BRIEF has been furnished, by U. S. Mail, to Gerald H. Bee, Esquire, 725 E. Kennedy Boulevard, Tampa; Florida 33601 and Wm. Reece Smith, Jr., P. O. Box 3239, Tampa, Florida 33601, Attorneys for Appellee, this 22nd day of January, 1971.

MALORY B. FRIER
Attorney for Appellant

"Person clothed with power as a public civil officer. *State ex rel Miller v. McLeod,* 142 Fla. 254, 194 So. 628, 630." *Black's Law Dictionary,* 4th Edition (1957).

The Supreme Court of Florida, following the Supreme Court of the United States in *Compton v. State of Alabama,* supra, has given the word "magistrate" a broad meaning and has held a Deputy Clerk to be a magistrate within the meaning of a Federal Extradition Act by virtue of the powers vested in said Clerk under the laws of the State of New York. *State ex rel Miller v. McLeod,* 142 Fla. 254, 194 So. 628, 630 (Sup. Ct. Fla. 1940).

In conclusion, Appellee respectfully shows the Court that the definition of the word "magistrate" as applied in the case law in the Florida and the Federal systems to determine the constitutionality of a warrant system is given a broad meaning. The Clerk and Deputy Clerks of the Municipal Court of the City of Tampa are neutral and detached "magistrates", unconnected with law enforcement, for the purpose of issuing arrest warrants within the requirements of the 4th and 14th Amend., U. S. Const., and Art. 1, Sec. 12, Fla. Const. (1968), by virtue of the Florida Laws fixing their powers and duties to issue arrest warrants. The lower court in its decision on appeal did not depart from these guiding principles and set forth the correct standard for a constitutional warrant procedure. (R-60, 61).

WHEREFORE, Appellee prays this Court to affirm and adopt the decision on appeal (R-57 thru 61).

Respectfully submitted,

WM. REECE SMITH, JR.
CITY ATTORNEY
By: GERALD H. BEE
Assistant City Attorney
725 E. Kennedy Boulevard
Tampa, Florida 33602
ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellee's Brief has been furnished, by U. S. Mail, to Malory B. Frier, Esquire, 1809 North Howard Avenue, Tampa, Florida 33607, Attorney for Appellant, this 16th day of December, 1970.

GERALD H. BEE

Chapter 24

POLICE DEPARTMENT*

Sec. 494. Powers of mayor 1903 Charter; organization of police force.

The duties of the mayor shall be to see that all the ordinances of the city council are faithfully executed, and he is authorized by and with the consent of the city council to organize and appoint such police force as shall be necessary to insure peace and good order of the city and the observance of law within the municipal limits. He shall have power to appoint by and with the consent of the city council, all officers of the city who are not made elective by this charter. He shall have the power to bid in all property for the city at any and all judicial sales, or sales under process of law, where the city is a party; to make pro tempore appointments to fill vacancies caused by death, sickness, absence or other disability of any city officer, but he shall not have the power to fill vacancies in the members of the board of commissioners of public works or of the city council. (Ch. 4883, Laws of Florida 1899; Ch. 5363, § 7, Laws of Florida 1903)

Sec. 495. Arrest with and without warrant.

The chief of police, or any policeman of the City of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person. (Ch. 4883, Laws of Florida 1889; Ch. 5363, § 17, Laws of Florida 1903)

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*Cross references—For the creation of a police department, see § 142; for the designation of the duties of the police department and the chief of police, see § 143; for the designation of the duties of the chief of police, see § 153.

He shall be the clerk of the board of representatives, and shall also act as ex-officio clerk of the municipal court. The clerk shall give such bond as the board of representatives may fix, and shall perform all the duties now or hereafter imposed upon him by law or ordinance not inconsistent with the provisions of this revised charter. The city clerk shall be paid as compensation for his services the sum of $3,600.00 per year, payabble in monthly installments. (Rev. Char., § 22, 1927)

Editor's note—The salary of the city clerk was $6000 as fixed by § 160 (see § 160.01).

Sec. 160. Same—Salary, 1957.

That beginning October 1, 1957, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of the city clerk of the City of Tampa, shall be six thousand dollars ($6,000.00) per annum, payable in equal monthly installments in the manner and form as now provided by law. (Sp. Acts Ch. 57-1908, § 1)

Editor's note—The salary of the clerk as established in the year 1949 is contained in § 161 and § 393.

Sec. 1160.01. Same—Salary, 1965.

Beginning October 1, 1965, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of the city clerk of the City of Tampa shall be seven thousand five hundred dollars ($7,500.00) per annum payable in equal monthly installments in the manner and form as now provided by law. (Sp. Acts, Ch. 65-2301, § 1)

Editor's note—Section 160.01, derived from Ch. 65-2301, § 1, supersedes the provisions regarding the city clerk's salary contained in previous enactments, as compiled in §§ 159, 161, and 393.

Sec. 160.1. Same—Appointment of deputies; powers.

The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself in-

cluding but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court. (Special Acts, Ch. 61-2915, § 1)

Cross reference—Section 415 empowers the city to make provision for a clerk of the municipal court.

Sec. 161. Salaries of mayor, clerk and attorney.

That beginning October 1, 1949, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of each of the officers of the City of Tampa, Florida, hereinafter enumerated shall be in the following amounts per annum:

Mayor $10,000.00

* * * * *

by attachment summarily against the person and property of the delinquent if the same can be found. Provided, that the penalty enforced shall in no case exceed imprisonment for more than six months or a fine of five hundred dollars, either or both; (2). they shall have power to remit fines and commute sentences imposed by the municipal judge; and

(d) In addition to the powers hereinbefore enumerated, the city council shall have the power and perform all the duties imposed upon them by the laws of Florida, now in force and which may hereafter be enacted, providing for the government of cities and towns, not inconsistent with the provisions of this act; and the mayor, chief of police, clerk, treasurer, tax assessor and tax collector, and other officers, shall have the powers and perform all the duties conferred and imposed upon them by general law.

(e) The said council shall have the power to fix and establish fire limits in said city and to prescribe rules and regulations for the erection and repair of buildings in said city; provided, that the fire limits as now established shall not be decreased except by unanimous consent of all persons owning property in any block to be

taken out of said fire limits. The city council shall also pass such ordinances as may be necessary to protect and preserve peace and order upon all property owned, leased, managed or controlled by said city outside of the city. (Special Acts, 1917, Ch. 7714, § 3; Special Acts, Ch. 61-2927, § 3)

Cross reference—For the powers of the city generally, see §§ 3, 4.

Sec. 5.1. Rewards for apprehension, conviction of persons committing capital crimes.

The City of Tampa is authorized to offer rewards, and to appropriate funds for the payment of such rewards, to a person or persons furnishing information resulting in the apprehension and conviction of any person or persons committing a capital crime within the corporate limits of the city. (Special Acts Ch. 59-1913, § 1)

Cross references—Authority of city to make appropriations for necessary municipal purposes, § 242; authority of city to provide group life, accident, hospitalization, annuity insurance, § 492.1.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT
JULY TERM, A.D. 1970

Case No. 70-62

GERALD SHADWICK,
Appellant,
v.
CITY OF TAMPA,
Appellee.

Opinion filed June 24, 1970

Appeal from the Circuit Court
for Hillsborough County;
Neil C. McMullen, Judge

Malory B. Frier, Tampa, for
Appellant.

Gerald H. Bee, Assistant City
Attorney, Tampa, for Appellee

HOBSON, CHIEF JUDGE

Appellant was charged in Tampa Municipal Court of careless driving while his ability to drive was impaired. He had been arrested under a warrant issued in the name of the city clerk of the City of Tampa, and signed by a deputy clerk. Appellant moved to quash the warrant in the municipal court on the grounds that the issuance of a warrant by a city clerk was the exercise of a judicial function by a non-judicial officer, and therefore a violation of the separation of powers under Fla. Const. Art. II, § 3 (1968), and Fla. Const. Art. V, § 1 (1968) which vests the judicial power in the courts of the state. Appellant's motion was denied, and he petitioned the Circuit Court of Hillsborough County for a writ of common law certiorari to review the denial of his motion to quash the warrant. The petition was denied by the Circuit Court, and the appellant appealed to the Supreme Court of Florida. The Supreme Court

found the matter to be within the jurisdiction of this court and transferred the case here.[1]

Appellant contends that Fla. Stat. § 168.04 (1967),[2] and Sections 495[3] and 160.1[4] of the charter of the City of Tampa are unconstitutional insofar as they purport to vest in the city clerk the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest. These and like provisions have been dealt with before by Florida courts,[5] but the constitutionality of the procedure has not been raised in this state.

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[1] F.A.R. 2.1(a)(5)(d).

[2] Fla. Stat. § 168.04 (1967): "Clerk and Marshal May Take Affivits and Issue Warrants

"The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaint and issue warrants for the arrest of persons complained against."

[3] Laws of Fla. 1903, Ch. 5363, § 17:

"The Chief of police, or any policeman of the city of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before a judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person."

[4] Laws of Fla. 1961, Ch. 61-2915, §1:

"The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court."

[5] United States v. Melvin, 258 F.Supp. 252 (S. D. Fla. 1966); Headley v. State ex rel. Bethune, 166 So.2d 479 (Fla. App. 3d 1964).

Appellant contends that the decision as to whether a warrant should issue is a judicial function and that because the legislature may not exercise judicial functions, it may not delegate judicial functions by statute to non-judicial officers. We disagree, and hold that the decision whether to issue a warrant is, at most, quasi-judicial and not within the "judicial power" reserved by the constitution to the judicial branch. *See generally* Florida Motor Lines v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930). *E.g.* Krelhaus v. City of Birmingham, 164 Ala. 623, 51 So. 297 (1909); State v. Ruotolo, 52 N.J. 508, 247 A.2d 1 (1968); State v. Thompson, 151 S.E.2d 870 (W. Va. 1966); *cf.* State v. Furmage, 250 N. C. 616, 109 S.E.2d 563 (1959). *Contra,* State v. Paulick, 277 Minn 140, 151 N.W.2d 591 (1967).

State v. Paulick, supra, relied upon heavily by appellant, dealt with the very question before this court in the case sub judice. There, the Supreme Court of Minnesota held that a statute which vested authority to issue arrest warrants in clerks of municipal courts was unconstitutional as a violation of the separation of powers. Although the court's opinion is scholarly and appealing, we choose to follow the reasoning of the Supreme Court of New Jersey in State v. Ruoloto, supra. The court stated at pages 3-5:

> "With regard to the issuance of a warrant, there is no doubt that if a determination of 'probable cause' is to have any meaning, it must be made by a neutral and detached court official who is immune from 'the often competitive enterprise of ferreting out crime.' Johnson v. United States, supra, 333 U.S. at 14, 68 S.Ct. at 369, 92 L.Ed. at 440."
>
> * * * *
>
> "A finding of neutrality, however, goes only part of the way to justify the challenged procedure. Before a deputy clerk is constitutionally permitted to determine whether the facts as alleged by the complainant constitute probable cause that an of-

fense has been committed and that the defendant is the culprit, we must ask: Is the deputy clerk qualified to exercise the necessary judgment?"

* * * *

"(W)e believe that background in the law, although desirable, is not a requirement imposed by the Constitution on a determination of probable cause. After all, probable case (sic) is a standard which is designed to be applied by laymen. A policeman may make an arrest without a warrant where there is probable cause, i.e., where there are facts which would lead 'a man of reasonable caution' to believe a crime has been or is being committed."

* * * *

"Throughout the history of this country laymen have served in various judicial capacities, and particularly in order to determine the existence of probable cause. United States Commissioners, appointed by the United States District Courts, have been invested with the power to issue arrest warrants in federal prosecutions. Fed. Rules Crim. Procedure 3, 4. Today, almost one-third of the United States commissioners are laymen. See Staff Memorandum, Subcommittee on Improvements in Judicial Machinery, reproted (sic) in Hearings, Senate Judiciary Committee, Federal Magistrates Act, 1967, p. 30. A grand jury, from which lawyers are routinely excluded, applies the standard of probable cause in determining whether to return an indictment. Grand jurors and petit jurors apply sundry rules of law to factual complexes; our jury system rests upon the premise that one need not be a lawyer to understand guiding principles and to make judgment in the light of them."

We feel that the emphasis should not be placed upon fine distinctions between judicial officers and non-judicial officers but instead upon the requirement that the person who issues the warrant be neutral and disinterested, and that such person make a finding of probable

cause before issuing a warrant. We see no evidence that the city clerk is unalterably aligned with the forces of law enforcement[6] and therefore he may fulfill the role of the neutral person which the constitution requires to be placed between the police and the public.

Appellant argues that the city, by allowing the clerk to issue arrest warrants, was providing nothing more than a "rubber stamp" for the police. If this were the case, it would be clearly unacceptable. However, there is nothing in the record to substantiate this allegation.

For the reasons stated, we hold the challenged statutes constitutional and the order appealed is

AFFIRMED.

LILES and McNULTY, JJ., CONCUR.

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[6] *E.g.* State v. Mathews, 270 N. C. 35, 153 S.E. 2d 791 (1967); State ex rel. White v. Simson, 28 Wis.2d 590, 137 N.W. 2d 391 (1965).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of October, 1971, a copy of the foregoing Motion to Dismiss or Affirm and Appendices was mailed, postage prepaid, to Malory B. Frier, Esquire, 1809 North Howard Avenue, Tampa, Florida 33607, Attorney for Appellant. I further certify that all parties required to be served have been served.

WM. REECE SMITH, JR.
Counsel for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5445

GERALD SHADWICK,

Appellant,

v.

CITY OF TAMPA,

Appellee.

APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE APPELLANT

MALORY B. FRIER
1809 North Howard Avenue
Tampa, Florida 33607
Counsel for Appellant

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Washington, D. C. THIEL PRESS 202 393-0625

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IN THE

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No. 71-5445

GERALD SHADWICK,

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v.

CITY OF TAMPA,

Appellee.

APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The decision of the Supreme Court of Florida (App. 41) is reported at 250 So.2d 4. That decision affirmed the earlier decision of the District Court of Appeal, Second District of Florida, which is contained in an opinion (App. 32) reported at 237 So.2d 231.

JURISDICTION

The Judgment of the Supreme Court of Florida was entered on June 16, 1971. Appellant did not petition for rehearing in that Court, and on September 1, 1971, filed his Notice of Appeal in the Supreme Court of Florida, the Court of Appeal for the Second District of Florida and the Circuit Court for Hillsborough County, Florida, because each of those three Courts were possessed of a different portion of the record on appeal in the cause. The appeal was docketed in this Court together with appellant's application to proceed in forma pauperis on September 13, 1971, and on January 10, 1972, this Court granted appellant's application to proceed in forma pauperis and noted probable jurisdiction. The jurisdiction of this Court is grounded under 28 U.S.C. 1257(2).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES INVOLVED

This appeal, and the proceedings in each of the Courts below, involve the validity of the following statutes of the State of Florida:

1. Florida Statute (1967) Section 168.04, F.S.A., which reads as follows:

> CLERK AND MARSHAL MAY TAKE AFFIDAVITS AND ISSUE WARRANTS
>
> The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaints and issue warrants for the arrest of persons complained against.

2. Section 495 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 17, Chapter 5363, Laws of Florida, 1903, which reads as follows:

> ARREST WITH AND WITHOUT WARRANT
>
> The Chief of Police, or any policeman of the City of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person.

3. Section 160.1 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 1, Chapter 61-2915, Laws of Florida, 1961, which reads as follows:

APPOINTMENT OF DEPUTIES; POWERS

The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court.

QUESTION PRESENTED

Whether special and general statutes of the State of Florida which authorize clerks of court to issue arrest warrants, and impliedly therewith, to determine the existence of probable cause for arrest, upon receiving a sworn affidavit charging the commission of an offense in conclusionary terms, conform with the requirements of the Fourth and Fourteenth Amendments to the United States Constitution, proscribing the issuance of such warrants unless issued by a judicial officer supplied with sufficient information to support an independent judgment that probable cause exists for such warrants.

STATEMENT OF THE CASE

On March 6, 1969, Corporal W. H. Larder of the City of Tampa Police Department, appeared before Nelson P. Gullo, a deputy clerk of the City of Tampa, and executed an affidavit for a warrant for the arrest of the appellant (App. 6).

Upon receiving the affidavit, the deputy clerk thereupon issued a warrant for the arrest of the appellant (App. 7).

The appellant was arrested under authority of that warrant and moved the Municipal Court to quash the warrant because it was issued by a non-judicial officer (App. 8). Appellant's motion was denied (App. 10) and he thereupon initiated proceedings under Florida Law in the Circuit

Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, seeking a Writ of Common Law Certiorari and contesting the constitutionality of the Florida Statutes previously quoted under the due process clause of the Fourteenth Amendment to the United States Constitution (App. 3). The Circuit Court denied relief, (App. 11) and on appeal, the District Court of Appeal, Second District of Florida, affirmed with an opinion (App. 32) reported in 237 So.2d 231, in which that Court held that neither the State nor Federal Constitution requires that the determination of probable cause necessary for the issuance of arrest warrants be made by a judicial officer, and that the city clerk was sufficiently neutral and disinterested to fulfill the role of the neutral person whom the Constitution requires to be placed between the police and the public. Appellant's petition for a rehearing (App. 36) in that Court was denied (App. 39) and he thereupon appealed the decision of that Court to the Supreme Court of Florida which affirmed the District Court of Appeal on June 16, 1971, with the opinion (App. 41) reported in 250 So.2d 4, in which the Supreme Court of Florida held that the clerk and deputy clerks of the Municipal Court of the City of Tampa are neutral and detached "magistrates", unconnected with law enforcement, for the purpose of issuing arrest warrants within the requirements of the Fourth and Fourteenth Amendments of the United States Constitution.

SUMMARY OF ARGUMENT

Statutes which authorize clerks of court to issue arrest warrants and, impliedly, to determine the existence of probable cause for their issuance, facially violate the Fourth and Fourteenth Amendments to the United States Constitution because such a procedure does not insure a deliberate, impartial judgment of an independent judicial officer to assess the weight and credibility of the evidence adduced as probable cause to authorize the resulting invasion of liberty and privacy which such warrants permit. This Court favors resort to a warrant by the police so that an indepen-

dent judicial officer may weigh the facts before them and determine whether an arrest is constitutionally permissible. Such a judgment involves not only the application of complex rules of law to determine the sufficiency of the evidence adduced, but also requires the exercise of sufficient independence and authority to grant or refuse requests for such warrants made by law enforcement officers. That type of independence and authority is possessed only by the judiciary, and its exercise is a judicial function. The practice exhibited by this case undermines the constitutional requirement of an independent determination of probable cause.

ARGUMENT

The Fourth Amendment to the United States Constitution guarantees that no warrant shall issue for the arrest of any person except upon probable cause supported by oath or affirmation measured by the same standards required for the issuance of search warrants. *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560 (1971). The same standards applicable to Federal warrants under the Fourth Amendment extend to the several states under the Fourteenth Amendment. *Ker v. California*, 374 U.S. 23 (1963). In a long line of decisions this Court has held that the determination of probable cause requisite to the issuance of such warrants must be made by a neutral and detached magistrate instead of law enforcement officers engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States*, 333 U.S. 10 (1948); *Coolidge v. New Hampshire*, 403 U.S. 443, 449-453 (1971). For this reason, such probable cause may not be made out by affidavits which are purely conclusory and which do not supply sufficient information to support an independent judgment of the magistrate that probable cause does exist. *Aguilar v. Texas*, 378 U.S. 108 (1964).

This appeal presents to this Court for the first time the question of whether the independent judgment that prob-

able cause exists for the issuance of the warrant required under the Fourth and Fourteenth Amendments may be made by a non-judicial officer, and specifically, whether it may be made by a clerk of court.

In *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560, 564 (1971), this Court stated:

> "The decisions of this Court concerning Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the *judicial officer* issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." (Emphasis supplied).

In *Camara v. Municipal Court*, 387 U.S. 523 (1967) this Court quoted from *Johnson v. United States*, 333 U.S. 10, 14 (1948):

> "When the right of privacy must reasonably yield to the right of search, is, as a rule to be decided by a *judicial officer*, not by a policeman or government enforcement agent." (Emphasis supplied.)

In *Wong Sun v. United States*, 371 U.S. 471 (1963) this Court said (at 371 U.S. 481-482):

> "The arrest warrant procedure serves to insure that the deliberate impartial judgment of a *judicial officer* will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." (Emphasis supplied.)

On the other hand, this Court used the following language in the 1914 decision it rendered in *Ocampo v. United States*, 234 U.S. 91, 100 (1914):

> "In short, the function of determining that probable cause exists for the arrest of a person accused is only quasi-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal."

The apparently contradictory language quoted from these decisions must be re-examined in light of the factual situa-

tions involved and questions decided in those cases. *Ocampo* dealt with the validity of an act of the Phillipine Commission authorizing the filing of an information subscribed and sworn to by the prosecuting attorney before the Judge of the Court of First Instance for the City of Manila, who thereupon issued the arrest warrant. The prosecuting attorney was required by that act to conduct a preliminary examination of witnesses under oath and to incorporate in the information a recital that such an investigation had been completed before filing the information. *Whiteley* dealt with an affidavit given by a sheriff containing only his conclusion that the individuals named therein had perpetrated the offense, without specifying the basis for that conclusion. In both cases, the actual warrant was issued by a judge, and not by any clerical personnel. In neither case did the prosecuting attorney or the sheriff base their allegations upon direct personal observations. In *Ocampo*, the Judge of the Court of First Instance was informed only that the prosecuting attorney had examined witnesses under oath, but was not informed of any facts revealed by that examination, although presumably the statutory certification of the information vouched for the credibility of those witnesses. *Whiteley* dealt with the admissibility of evidence obtained as a result of a search made incident to an arrest under the warrant in question, whereas *Ocampo* dealt only with the question of whether a conviction obtained in a criminal prosecution initiated without presentment or indictment by a grand jury violated the Philippine Bill of Rights, which was enacted by Congress. *Whiteley, Camara, Wong Sun* and *Johnson* were decided on constitutional grounds under the Fourth and Fourteenth Amendments, whereas the decision in *Ocampo* expressly stated that the United States Constitution did not of its own force apply to the Philippine Islands. 234 U.S. at 98. This Court has refused to regard its decisions relating to the Philippine Islands—"a territory just recently conquered with long-established legal procedures that were alien to the common law"—as controlling in the interpretation of the United States Constitution. *Green v. United States*, 335 U.S. 184, 197 (1957).

The importance of the question as to who is empowered to make the determination of the existence of probable cause for the issuance of a warrant for arrest is emphasized when it is remembered that this Court has shown a strong preference for resort to a warrant by the police. This Court said in *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932):

> "[T]he informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests."

See also *Jones v. United States*, 362 U.S. 257, 270-71 (1960); *United States v. Ventresca*, 380 U.S. 102, 105-07 (1965); *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560, 566 (1971).

In such situations, this Court has held that:

> "[W]hen a search is based upon a magistrate's rather than a police officer's determination of probable cause, the reviewing Courts will accept evidence of a 'less judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant' * * * ." *Aguilar v. Texas*, 378 U.S. 108, 110 (1964).

Likewise, this Court said in *United States v. Ventresca*, 380 U.S. 102, 109 (1965):

> "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

The requirement of a warrant procedure administered by an independent judicial officer is thus both an aid to law enforcement and a protection for the individual.

But if a warrant can be issued by one who is not an independent judicial officer, the premise which justifies upholding arrests and searches on a warrant in doubtful cases disappears. And as in *Jones v. United States, supra*,

362 U.S. at 270, under such a rule, "resort to [warrants] would ultimately be discouraged."

The Florida Supreme Court held that the clerk of the Municipal Court for the City of Tampa was a neutral and detached "magistrate" within the intendment of this Court's decisions because this Court had previously defined the term "magistrate" to include a Notary Public for the purpose of construing the Federal statute governing interstate extradition proceedings in *Compton v. Alabama*, 214 U.S. 1 (1909). However the constitutional question raised in this proceeding was neither raised nor decided in that case; and an examination of that decision reveals that under Georgia law, in effect at that time, notaries public were "ex-officio justices of the peace" who were required to "keep separate dockets of all civil and criminal *cases* disposed of by them" (emphasis supplied). Accordingly Georgia's requisition to Alabama, supported by an affidavit sworn to before a Notary Public, sufficiently complied with the Federal statutory requirement that such a requisition be supported by "an indictment found or an affidavit made before a magistrate." It is apparent that the function of the "magistrate" in that type of proceeding does not include the determination of probable cause required to insure protection under the Fourth and Fourteenth Amendments.

The protection afforded by the Fourth and Fourteenth Amendments to the United States Constitution, of requiring a determination of the existence of probable cause before a warrant may issue, contemplates the application of often complex rules of law to determine the sufficiency of the facts adduced to support the conclusion which the applicant for the warrant contends should be drawn therefrom. *Jaben v. United States*, 381 U.S. 214 (1965). See also *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

Perhaps more importantly, such a determination requires the exercise of sufficient independence and authority to grant or refuse requests for warrants to avoid serving "merely as a rubber stamp for the police." *United States v. Ven-*

tresca, 380 U.S. 102, 109, (1965); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964). Such a decision should be clothed with the same immunity as that of a judge performing the same duty. *United States v. Lawrence*, 3 Dall. 42, 1 L.Ed. 502 (1795).

An inspection of the affidavit and warrant reproduced in the appendix (App. 6-7) reveals that the conclusory statement of the officer in this case has been actually and literally reduced to a rubber stamp, imprinted in the blank spaces provided on the printed form affidavit and warrant. The issuance of the warrant by the deputy clerk of court in this case could not have amounted to anything more than the formality of affixing his signature.

The Florida practice revealed by the record in this case is destructive of the constitutional rights declared by this Court in *Gio-denello v. United States*, 357 U.S. 480 (1958), and *Aguilar v. Texas*, 378 U.S. 108 (1964). In *Giordenello*, this Court held that the "neutral and detached magistrate" required by the Fourth Amendment "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. *He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.*" 357 U.S. at 486. (Emphasis supplied.) This Court in *Aguilar* held *Giordenello* applicable to the States under the Fourteenth Amendment. 378 U.S. at 112 n. 3. The Florida procedure does not conform with the principles of these cases.*

The total lack of constitutional safeguards against invasion of liberty and privacy by such a procedure becomes all the more apparent, when it is realized that the conclusory statement of the offense charged in this case fully complies with Florida law as pronounced by the Florida Supreme Court in the cases of *Lee v. Van Pelt*, 57 Fla. 94, 48 So.

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*In some communities, police officers are also deputy clerks of court with the power to issue arrest warrants. See *United States v. Melvin*, 258 F.Supp. 252 (S.D. Fla. 1966); *cf. Coolidge v. New Hampshire*, 403 U.S. 443, 452-53 (1971).

632 (1909), and *Williams v. State*, 97 Fla. 401, 121 So. 462 (1929). See also *Foster v. Gilbert*, 264 F.Supp. 209 (S.D. Fla. 1967).

An examination of the decisions of the several State courts, where this question has been raised, reveals that four states (Delaware, Indiana, Minnesota and Wisconsin) have held that the requirements of the Fourth and Fourteenth Amendments prohibit the delegation to a court clerk of the power to determine the existence of probable cause required for the issuance of an arrest warrant. *Caulk v. Municipal Court*, 243 A.2d 707 (Del. 1968); *French v. Superior Court*, 247 N.E.2d 519 (Ind. 1969); *State v. Simpson*, 28 Wisc. 2d 590, 137 N.W.2d 391 (1965) and *State v. Paulick*, 277 Minn. 40, 151 N.W.2d 591 (1967). While Alabama and North Carolina have held that delegation of that function to court clerks did not violate the separation of powers clause contained in their state constitutions in the cases of *Kruelhaus v. Birmingham*, 164 Ala. 623, 51 So. 297 (1909), and *State v. Furmage*, 250 N.C. 616, 109 S.E.2d 563 (1959), later decisions of those Courts indicate that a different result might have been reached upon a consideration of Fourth and Fourteenth Amendment issues. *Miller v. Birmingham*, 218 So.2d 281 (Ala. 1969); *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967). Although West Virginia has held that arrest warrants may be issued by a police lieutenant, the requirements of the Fourth and Fourteenth Amendments were not dealt with by that state's highest court in *State v. Thompson*, 151 W.Va. 336, 151 S.E.2d 870 (1966). The only states which have held that a clerk of court is not prohibited by the Fourth and Fourteenth Amendments to the United States Constitution from making the determination of existence of probable cause required for the issuance of an arrest warrant, are Florida, in the decision appealed from, and New Jersey, in *State v. Ruotola*, 52 N.J. 508, 247 A.2d 1, (1968).

Unquestionably, it is more convenient to police officers to be able to obtain arrest warrants from clerical personnel

of the city, than to obtain an audience before one of the City's Municipal Court Judges and submit for judicial determination the information believed to constitute probable cause. The convenience, however, is hardly the type of compelling governmental interest that justifies an invasion of the constitutionally protected liberty of private citizens. In the absence of a showing of a compelling need for pre-trial arrest and detention, there is no valid reason why jurisdiction over the person of a citizen charged with the violation of a municipal ordinance cannot be obtained by service of a summons. If, on the other hand, it is contended by the police that arrest and pre-trial detention are necessary, although adequate grounds for arrest without a warrant do not exist, then that decision can only be made by one possessing the independent discretion of a judicial officer.

CONCLUSION

The judgment in this case should be reversed and remanded to the Supreme Court of Florida for further proceedings not inconsistent with the opinion of this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM - 1971

No. 71-5445

GERALD SHADWICK, *Appellant,*

v.

CITY OF TAMPA, *Appellee.*

APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE APPELLEE

DOCKETED SEPTEMBER 13, 1971
JURISDICTION NOTED JANUARY 10, 1972

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FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

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OPINION BELOW

The opinion of the Supreme Court of Florida (A. 41) is reported at 250 So. 2d 4 (1971).

JURISDICTION

Jurisdiction of this Court rests on 28 U.S.C. 1257 (2).

CONSTITUTIONAL PROVISIONS AND FLORIDA STATUTES INVOLVED

The constitutional provisions involved are the Fourth and Fourteenth Amendments, United States Constitution (App. 1). The statutes involved are Florida Statute (1967), Section 168.04, F.S.A.; Section 17, Chapter 5363, Laws of Florida, 1903 and Section 1, Chapter 61-2915, Laws of Florida, 1961 (Special Laws of Florida incorporated in Sections 495 and 160.1, respectively, Charter of the City of Tampa). These statutes are printed in the appendix attached to this brief (App. 1, 2).

QUESTIONS PRESENTED

I. WHETHER SPECIAL AND GENERAL LAWS PERTAINING TO DUTIES OF CLERKS OF THE MUNICIPAL COURT TO ISSUE ARREST WARRANTS, AND IMPLIEDLY THEREWITH, THE POWER TO DETERMINE PROBABLE CAUSE, ARE CONSTITUTIONAL EXERCISE OR DELEGATION OF A QUASI-JUDICIAL POWER AND CONFORM TO THE REQUIREMENTS OF THE FOURTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

II. WHETHER THE CLERK AND DEPUTY CLERKS OF THE MUNICIPAL COURT OF THE CITY OF TAMPA ARE NEUTRAL AND DETACHED "MAGISTRATES", UNCONNECTED WITH LAW ENFORCEMENT, FOR THE PURPOSE OF ISSUING ARREST WARRANTS WITHIN THE REQUIREMENTS OF THE FOURTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, BY VIRTUE OF THE FLORIDA STATUTES FIXING THEIR POWERS AND DUTIES TO ISSUE ARREST WARRANTS.

STATEMENT OF THE CASE

This is an appeal from a final judgment rendered by the Supreme Court of Florida, reported as *Shadwick v. City of Tampa,* 250 So. 2d 4 (1971) (A. 41-43) where the question of the validity of state statutes (App. 1, 2) as being repugnant to the Fourth and Fourteenth Amendments, United States Constitution, were drawn into question, and the decision was in favor of their validity. The statutes involved vest in the city clerks the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest.

In this brief the parties will be referred to as they stand in this Court, Appellant and Appellee, respectively.

The following symbols will be used:

"A." for Single Appendix.

"R." for original Record-on-Appeal to Supreme Court of Florida.

"App." for Appendix to this Brief for Appellee.

"A.B." for Appellant's Brief.

For the purpose of correcting inaccuracies or omissions in the Statement of the Case (A.B. - 4, 5) in Appellant's Brief, the following statements are deemed necessary.

Contrary to Appellant's statement that the District Court of Appeal, Second District, held that neither the State nor Federal Constitution require that the determination of probable cause necessary for the issuance of arrest warrants be made by a judicial officer (A.B. - 5), the Court stated,

> "We . . . hold that the decision whether to issue a warrant is, at most, quasi-judicial and not within the 'judicial power' reserved by the constitution to the judicial branch." (A. - 33).
>
> * * * *
>
> ". . . that the person who issues the warrant be neutral and disinterested, and that such person make a finding of probable cause before issuing a warrant. We see no evidence that the city clerk is unalterably aligned with the forces of law enforce-

ment and therefore he may fulfill the role of the neutral person which the constitution requires to be placed between the police and the public." (A. - 35).

The Appellant omitted the holdings of the Supreme Court of Florida directed to the issue raised and expressly passed upon, as follows:

". . . the determination of probable cause for an arrest need not be confined to strictly judicial officers, as such a function is only quasi-judicial. *Ocampo v. U.S.*, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231 (1914)." (A. - 42).

* * * *

". . . the statutes authorizing a clerk or deputy clerk of a municipal court to issue arrest warrants are not an unconstitutional exercise or delegation of 'judicial power' and conform to the requirement of the Fourth and Fourteenth Amendments to the Constitution of the United States." (A. - 42).

SUMMARY OF ARGUMENT I.

Appellant did not raise, brief or argue the conclusory terms of the affidavit (A. - 4) for issuing the arrest warrant, (A. - 5), which is the reason why there is no complaint, evidence or record in support of that affidavit (A. - 4) on this issue.

It would be highly unjust to the labors of the Florida courts under these circumstances for this Court to reverse the lower court's judgment (A. - 41) under the authority of 28 U.S.C. 2106, especially since Appellant has not been tried nor lost his right to raise these issues prior thereto.

Justice under the circumstances is not served, but subverted, if good law and sound reasoning (A. - 41) falls to the snare of unraised issues and unmade record.

The Constitution of the State of Florida provides that special laws or general laws of local application, such as are here involved (App. 1, 2), may be passed by the Legislature pertaining to the duties of municipal officers. The Legislature by these laws has provided that the clerk or deputy clerks of the municipal court shall issue arrest warrants in the City of Tampa.

This Court has held that the function of determining that probable cause exists for the arrest of a person accused is only quasi-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer. *Ocampo v. United States,* 234 U.S. 91, 100 (1914).

A quasi-judicial power to issue warrants of arrest implies the power to determine probable cause. The legislature in giving this power to clerks could not have intended to withhold the functions necessary to exercise that power (determine probable cause).

Neither the Fourth or Fourteenth Amendments, United States Constitution, nor any case law by this Court forbids states to legislate quasi-judicial powers or duties to clerks.

ARGUMENT I.

WHETHER SPECIAL AND GENERAL LAWS PERTAINING TO DUTIES OF CLERKS OF THE MUNICIPAL COURT TO ISSUE ARREST WARRANTS, AND IMPLIEDLY THEREWITH, THE POWER TO DETERMINE PROBABLE CAUSE, ARE CONSTITUTIONAL EXERCISE OR DELEGATION OF A QUASI-JUDICIAL POWER AND CONFORM TO THE REQUIREMENTS OF THE FOURTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

Appellant cites in his brief (A.B. - 6, 7) numerous decisions by this Court, that before an arrest warrant is issued by a magistrate, that the Fourth and Fourteenth Amendments require that he be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. See, *Whiteley v. Warden of Wyoming State Penitentiary,* 401 U.S. 560 (1971) and the cases cited therein.

It logically follows that an affidavit which is conclusory such as here involved (A. - 4) is not constitutionally sufficient. *Aguilar v. Texas,* 378 U.S. 108 (1964). This is to be distinguished from those cases where the search or arrest warrant itself is invalid when issued by a police officer, attorney general, prosecutor or government enforcement agent because they are not "neutral and detached magistrates." *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). In the case, sub judice, the deputy clerk of the municipal court of the City of Tampa issued the arrest warrant (A. - 5) and his neutrality and detachment is the subject of the second argument in this brief.

If this Court accepts the issue submitted by the Appellant upon the basis of the conclusory terms of the

affidavit (A. - 4) as being insufficient information to support an independent judgment by the clerk that probable cause existed, it should do so upon the basis of the record as in *Whiteley, supra,*

> "Yet the state concedes, as on the record it must, that at *every* stage in the proceedings below petitioner argued the insufficiency of the warrant as well as the lack of probable cause at the time of the arrest." 401 U.S. at 569. (Emphasis supplied).

This Appellant has failed to do so at *every* essential stage in the proceedings below.

Appellant's issue regarding the conclusory affidavit (A. - 4) was not raised, briefed or argued in the trial court, the Municipal Court of the City of Tampa (A. - 8, 9); nor in the Circuit Court, Hillsborough County, Florida, on Petition for Writ of Certiorari (A. - 3, 4, 13, 14); nor on appeal to the intermediate state court, the District Court of Appeal, Second District, by assignments of error (A. - 12) or by argument (A. - 33); nor briefed or argued (A. - 42) in the Supreme Court of Florida (See Appellant's and Appellee's Brief to Supreme Court of Florida transmitted with the original record to the Clerk, Supreme Court of the United States).

The record is absolutely silent and left to speculation any factual information the clerk may have had for issuing the arrest warrant for the Appellant unlike the facts in *Whiteley, supra,* and for a very good reason, because whether the clerk in fact had sufficient information to determine probable cause was never an issue. The Order Denying Motion to Quash (A. - 10) and supporting motion (A. - 8) are clear that Appellant did not present to the municipal judge any sworn testi-

mony of Officer Larder, the clerk, the Appellant or any other witness for the purpose of questioning the existence of probable cause or the conclusory terms of the affidavit. As to the question of the printed-form affidavit (A. - 4) and Warrant (A. - 5), or the conclusory language therein, the only time the Appellant grasped at these lost issues was on Petition for Rehearing (A. - 36, 37) at the intermediate state court level and then completely abandoned them in the Supreme Court of Florida (A. - 41). This is further evidenced by the fact that Appellant did not file a Petition for Rehearing to that Court which certainly would have been done had these issues been briefed, argued and then ignored by the Supreme Court of Florida.

The argument made by Appellant in the circuit court shows that the issue was the constitutionality of the statutes (App. 1, 2) vesting the *power* in the clerks to issue arrest warrants and not the sufficiency of the affidavit (A. - 4), its form, or the sufficiency of factual information received by the clerk to determine probable cause. It was never a question of did the clerk determine probable cause. The question was, can he.

> "Mr. Frier: . . . The position taken by the Petitioner in the original brief is that the City Charter did not authorize the Clerk to issue an arrest warrant (A. - 13, 14).
>
> * * * *
>
> "So we are here today solely on the question of the constitutionality of both statutes (A. - 14).
>
> * * * *
>
> "It is the contention of the Petitioner that a Clerk of the Court is an administrative officer and not *empowered* to exercise any discretion (A.-14). (Emphasis Supplied).
>
> * * * *

> "We are dealing here with whether or not a particular officer *can* exercise judicial functions; . . . (A. - 14). (Emphasis Supplied).
>
> * * * *
>
> "Mr. Frier: The argument I have made doesn't say we have to have a Judge do it. The argument I have made contemplates a quasi-judicial officer initiating the charges or a judiciary determination of probable cause before the issuance of a warrant." (A. - 29, 30).

Again in the Supreme Court of Florida, the same argument appears as follows.

> "Appellant says the clerk or deputy clerk of the municipal court is not a judicial officer such as could perform the *duties* of determining probable cause or *act* as a neutral or detached magistrate in the exercise of a judicial discretion to determine the existence of probable cause." (A. - 42). (Emphasis Supplied).

It is inconceivable and incongruous, had Appellant raised, briefed and argued the issues of the insufficiency of the affidavit being in conclusionary terms (A. - 4) and the insufficiency of probable cause required to issue the warrant (A. - 5), that one municipal judge, one circuit court judge, three district court judges and seven Justices of the Supreme Court of Florida missed the point.

If this Court is to speculate on these issues, then it should take a cold, hard look at the affidavit (A. - 4) where it states that Cpl. Larder ". . . has this day made *complaint* before me that on the *8th day of February, A. D. 1969,* . . ." (Emphasis supplied) and ask itself where is that *complaint* in support of that affidavit. Why did Cpl. Larder wait one month from February 8,

1969, until March 6, 1969, (A. - 4) before he submitted a *complaint* in support of the affidavit? Could it be that there are facts in that *complaint* in support of the affidavit to establish probable cause? Could it be that Cpl. Larder arrested Appellant on the street on February 8, 1969, for "careless driving while drinking" and that the subsequent warrant (A. - 5) on March 6, 1969, was merely a rearrest?

All of this is pure speculation on the record before this Court, but no more speculative than these issues raised by the Appellant.

The point is that this Court should not condemn a warrant procedure based upon speculation or inferences with no record to support issues which were never raised in the first place (A. - 8) or, for that matter, in the last place. (A. - 41). *Oxley Stave Co. v. Butler Co.*, 166 U.S. 648, 655 (1897).

The Supreme Court of Florida clearly set forth the issue that rests upon this Court's shoulders.

> "The only question involved is whether Fla. Stat. (1967) Section 168.04, F.S.A., and Sections 495 and 160.1 of the Charter of the City of Tampa (the provisions of these statutes are included in the District Court of Appeal opinion, 237 So.2d 231, 232) are unconstitutional insofar as they purport to vest in the city clerk the *power* to issue arrest warrants, and impliedly therewith, the *power* to determine the question of probable cause for the arrest." (A. - 41) (Emphasis Supplied).

The Florida Constitution provides that special laws or general laws of local application which are here involved (App. 1, 2) may be enacted by the Legislature pertaining to the duties of municipal officers. Fla. Const. Art. III, Section 11 (a) (1) (1968).

Legislating quasi-judicial duties or powers are not an unconstitutional exercise or delegation of "judicial power." *Florida Motor Lines v. Railroad Commissioners,* 100 Fla. 538, 129 So. 876 (1930).

> The general law on the subject is as follows:
> "When so provided by *statute,* the authority to issue warrants may be vested in officers whose *other* duties are purely ministerial, such as clerks, . . ." 22 C. J. S., *Criminal Law,* Section 318, pp. 820, 821. (Emphasis Supplied).
>
> "A clerk of court may not exercise judicial power except by constitutional or *legislative provision,* and then only in accordance with the strict language of the provision. . . .
>
> * * * *
>
> "Certain acts, although *partially judicial* in nature, may be performed by the clerk of the court. A familiar example is the *power* to issue *warrants of arrest."* 15 Am. Jr. 2d, *Clerks of Court,* Section 22, pp. 528, 529. (Emphasis Supplied).

In *Ocampo v. United States* 234 U.S. 91, 93-95 (1914) the appellant contended that his arrest was without a preliminary finding of probable cause in violation of his rights secured under the Philippine Bill of Rights, Section 5, which was enacted by the Congress of the United States on July 1, 1902. The act followed certain provisions of the Constitution of the United States, to wit, the Fourth and Fourteenth Amendments, which are the constitutional provisions here involved (App. 1).

> "Sec. 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein the equal protection of the law.
>
> * * * *

"That no warrant shall issue but upon probable cause, supported by oath or affirmation . . ." *Ocampo, supra,* 234 U.S. at 94, 95.

In *Ocampo* in considering the due process and equal protection clauses this Court held that constitutional guarantees do not require territorial uniformity among the several states, local governments or cities regarding the administration of justice such as the right to a preliminary examination (criminal procedure). *Ocampo, supra,* 234 U.S. at 98, 99. See also, *Salsburg v. State of Maryland,* 346 U.S. 545, 552-553 (1954). The requirement of state-wide uniformity in criminal procedures would inhibit progress in the administration of Justice. *United States v. Commissioners of Correction, City of New York,* 316 F. Supp. 556, 564-566 (D. C. S.D.N.Y. 1970).

More importantly, and in point to the issues before this Court as expressly passed upon by the Supreme Court of Florida (A. - 41), the Supreme Court of Florida followed the *Ocampo* decision (A.-- 42) that,

> ". . . the function of determining that probable cause exists for the arrest of a person accused is only *quasi-judicial,* and not such that, because of its nature, it must necessarily be confided to a *strictly judicial officer* or tribunal." (Emphasis Supplied). *Ocampo, supra,* 234 U.S. at 100.

The various legal concepts contained in *Ocampo* have been followed in fourteen states. *Burke v. Superior Court,* 3 Ariz. App. 576, 416 P. 2d 997, 1000 (Ct. App. Ariz. 1966); *Parks v. Superior Court,* 236 P.2d 874, 882 (1st D.C.A. Calif. 1951); *Kennedy v. Walker,* 135 Conn. 262, 63 A.2d 589, 594 (Sup. Ct. Conn. 1948); *Shadwick v. City of Tampa,* 250 So. 2d 4 (Sup. Ct. Fla. 1971); *State v. Swafford,* 250 Ind. 541, 237 N.E. 2d 580, 584 (Sup.

Ct. Ind. 1968); *Bailey v. Hudspeth,* 164 Kan. 600, 191 P. 2d 894, 898 (Sup. Ct. Kan. 1948); *State v. Guidry,* 247 La. 631, 173 So. 2d 192, 194 (Sup. Ct. La. 1965); *Wampler v. Warden of Maryland Penitentiary,* 231 Md. 639, 191 A.2d 594, 600 (Ct. App. Md. 1963); *Lockapelle v. United Shoe Machinery Corporation,* 318 Mass. 166, 61 N.E. 2d 8, 10 (Sup. Ct. Mass. 1945); *People v. Richter,* 206 Misc. 304, 133 N.Y.S.2d 685, 688 (1954); *State v. Furmage,* 250 N.C. 616, 109 S.E.2d 563, 570 (Sup. Ct. N.C. 1959); *Moseley v. Welch,* 218 So. C. 242, 62 S.E.2d 313, 317 (Sup. Ct. So. C. 1950); *State v. Jefferson,* 79 Wash. 2d 345, 485 P.2d 77, 79 (Sup. Ct. Wash. 1971); *State v. Thompson,* 151 W. Va. 336, 151 S.E.2d 870, 873 (Sup. Ct. App. W. Va. 1966).

The power to issue warrants of arrest necessarily implies the power to hear and determine the issue of probable cause. *State v. Furmage,* 250 N.C. 616, 109 S.E.2d 563, 566 (Sup. Ct. N.C. 1959); *Kreulhaus v. City of Birmingham,* 164 Ala. 623, 51 So. 297, 299 (Sup. Ct. Ala. 1909). It would be senseless for a legislature to confer a quasi-judicial power or duty and not intend that the official perform the functions necessary to exercise that power or duty (determine probable cause).

Appellant in his brief states that Delaware, Indiana, Wisconsin and Minnesota have held that a clerk is prohibited the power to determine probable cause under the Fourth and Fourteenth Amendments (A.B. - 12). This is just not correct.

Delaware has taken the position that other procedures in other states, different from the State of Delaware, are not unique and conform to constitutional standards. *Grano v. State,* 257 A.2d 768, 773-774 (Sup. Ct. Del. 1969).

Indiana has not taken a position contrary to Florida in the case, sub judice,

> ". . . it is a long standing rule in Indiana that the determination of probable cause is a judicial determination to be made by a judge or *magistrate,* and not a ministerial determination." *French v. Hendricks Superior Court,* 252 Ind. 213, 247 N.E.2d 519, 525 (Sup. Ct. Ind. 1969) (Emphasis Supplied).

Even more favorable to the Florida position, the Indiana Supreme Court was divided over the issues before it. See the strong dissent by Justice Arterburn in *French, supra.* 247 N.E.2d at 528. More recently in a decision written by now Chief Justice Arterburn, the Indiana Supreme Court has held that where an arrest has already been made by a police officer, then probable cause already exists and a subsequent affidavit in support of a rearrest warrant is not necessary. *Rector v. State,* 271 N.E.2d 452, 454-455 (Sup. Ct. Ind. 1971).

The one case in Wisconsin that Appellant cited in his brief (A.B. - 12) did not involve a clerk. That case held that a district attorney is not a magistrate such as can be neutral and detached as required by the Fourth and Fourteenth Amendments. *State v. Simpson,* 28 Wisc. 2d 590, 137 N.W.2d 391 (Sup. Ct. Wisc. 1965). In fact Wisconsin has specifically held that the legislature may confer upon clerks of courts the power to issue arrest warrants. *State v. Van Brocklin,* 194 Wisc. 441, 217 N.W. 277, 278 (Sup. Ct. Wisc. 1927); *Family Finance Corp. of Bay View v. Sniadach,* 37 Wisc. 2d 163, 154 N.W.2d 259, 266 (Sup. Ct. Wisc. 1967), reversed on other grounds, 395 U.S. 337.

The only state supporting Appellant's position on the constitutionality of a statute authorizing clerks to issue warrants is Minnesota. *State v. Paulick,* 277 Minn.

40, 151 N.W.2d 591 (Sup. Ct. Minn. 1967). The court in *Paulick* obviously struck down the statute authorizing municipal court clerks to issue warrants because that statute was *in conflict with* the general law of Minnesota which specifically provided that only magistrates may do so. Id., 151 N.W.2d at 593-594. Obviously, the municipal court clerks were not designated magistrates under Minnesota's general law.

In Florida, however, under the special and general laws (App. 1, 2) authorizing the clerk of the municipal court, or his deputies, to issue warrants for arrest are not incompatible or in conflict with each other (A. -42). *Headley v. State,* 166 So.2d 479 (3rd D.C.A. Fla. 1964); *Shadwick v. City of Tampa,* 250 So.2d 4 (Sup. Ct. Fla. 1971), which is the decision here on Appeal (A. -41). Unlike Minnesota, Florida general law provides that the clerk may issue arrest warrants (App. 1). Fla. Stat. Section 168.04 (1967).

Alabama and North Carolina have not changed their stand with Florida in regard to clerks as implied in Appellant's brief (A. -12). *Kruelhaus v. City of Birmingham,* 164 Ala. 623, 51 So. 297 (1909); *State v. Furmage,* 250 N.C. 616, 109 S.E.2d 563 (1959). Alabama and North arolina have held, as Appellant failed to point out in his brief in the cases he cited for a changed position regarding clerks in these states (A.B. -12), that statutes allowing a police officer to be a magistrate in Alabama may be unconstitutional (dictum because the issue was not directly before the court) and that statutes allowing a "desk officer" appointed by the chief of police to issue warrants in North Carolina failed to meet the requirements of the Fourth and Fourteenth Amendments. *Miller v. City of Birmingham,* 44 Ala. App. 628, 218 So.2d 281 (Ct. App. Ala. 1969); *State v. Mat-*

thews, 270 N.C. 35, 153 S.E.2d 791 (1967). As previously well documented, police officers are not neutral and detached magistrates. The case, sub judice, does not involve a police officer issuing warrants. It involves a *clerk* (A. -5).

There is nothing in the Fourth and Fourteenth Amendments, United States Constitution (App. 1), or case law by this Court that forbids states to legislate quasi-judicial powers or duties to clerks of municipal courts establishing a procedure to issue arrest warrants, and impliedly therewith, the power to determine probable cause.

CONCLUSION I.

The judgment of the Supreme Court of Florida (A. - 41) should be affirmed.

SUMMARY OF ARGUMENT II.

The word "magistrate" as applied in the case law in the Federal and the Florida jurisprudence to determine the constitutionality of a warrant system is given a broad meaning.

The Supreme Court of the United States and the Supreme Court of Florida have both held that minor officials such as clerks are "magistrates" by virtue of the state laws fixing their powers.

The clerks of the municipal court of the City of Tampa are not sworn police officers and are not appointed by the chief of police. They are responsible to the judicial department of the City of Tampa as officers of the court and are neutral and detached "magistrates" required by the Fourth and Fourteenth Amendments, United States Constitution, to be placed between law enforcement and the public.

ARGUMENT II.

WHETHER THE CLERK AND DEPUTY CLERKS OF THE MUNICIPAL COURT OF THE CITY OF TAMPA ARE NEUTRAL AND DETACHED "MAGISTRATES", UNCONNECTED WITH LAW ENFORCEMENT, FOR THE PURPOSE OF ISSUING ARREST WARRANTS WITHIN THE REQUIREMENTS OF THE FOURTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, BY VIRTUE OF THE FLORIDA STATUTES FIXING THEIR POWERS AND DUTIES TO ISSUE ARREST WARRANTS.

In the realm of a constitutional warrant procedure, can a clerk or deputy clerk be a "magistrate."

This Court has given the word "magistrate" a broad meaning. In a general sense a magistrate is a public civil officer, possessing such power, legislative, executive, or judicial, as the government appointing him may ordain; though in a narrow sense he is regarded as an inferior judicial officer. *J. D. Compton v. State of Alabama,* 214 U.S. 1, 7(1909). Mr. Justice Storey was quoted in *Compton, supra,*

> "I know of no other definition of the term 'magistrate' than that he is a person clothed with power as a public civil officer." Id., 214 U.S. at 7.

The Supreme Court of Florida following the Supreme Court of the United States in *Compton, supra,* has also given the word "magistrate" a broad meaning and has held a deputy clerk to be a magistrate within the meaning of a federal extradition act by virtue of the powers vested in said clerk under the laws of the State of New York. *State ex rel Miller v. McLeod,* 142 Fla. 254, 194 So. 628, 630 (Sup Ct. Fla. 1940).

In the federal system, clerks of municipal court clothed with authority under state statutes to issue arrest warrants are considered to be "magistrates." See generally, *State v. Ruotolo*, 52 N.J. 508, 247 A.2d 1, 5 (1968) footnote No. 4, citing *State ex rel Miller v. McLeod, supra.*

Other definitions of a "magistrate" are contained in the following:

> "A person clothed with power as a public civil officer; a public civil officer invested with executive or judicial powers; . . ." *Webster's New International Dictionary, Second Edition,* unabridged, page 1479.

> "Person clothed with power as a public civil officer. *State ex rel Miller v. McLeod,* 142 Fla. 254, 194 So. 628, 630." *Black's Law Dictionary, 4th Edition,* page 1103 (1957).

There is no question that a constitutional warrant procedure requires that inferences from facts which lead to the complaint ". . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Giordenello v. U.S.*, 357 U.S. 480, 486 (1958); *Johnson v. U.S.*, 333 U.S. 10, 14 (1948); *U.S. v. Lefkowicz*, 285 U.S. 452, 464 (1932); *U.S. v. Kirschenblatt*, 16 F.2d 202, 203 (2nd C.C.A. 1926).

In Florida, as in New Jersey, the clerk is completely independent of any agency charged with the apprehension and prosecution of offenders. *State v. Ruotolo*, 52 N.J. 508, 247 A.2d 1 (Sup. Ct. N.J. 1968). This neutrality and detachment qualifies the clerk of municipal court as a "magistrate" as required by the Fourth and Four-

teenth Amendments and this was the specific holding in *Ruotolo, supra. Ruotolo, supra,* is on point directly with this case, sub judice.

It is undisputed that the clerks of municipal court in the City of Tampa are not associated or connected in any way with the police department or any other law enforcement or prosecutive authority, but are directly responsible to the judicial branch of the municipal court.

> "Mr. Bee: . . . Our Municipal Clerks are not sworn police officers. They are officers of the Court." (A.-25).

This fact is further borne out by Section 160.1, Charter of the City of Tampa, (Laws of Fla. 1961, Ch. 61-2915, Section 1) which is one of the special laws now before this Court in consideration of its constitutionality (App. 2). That special law provides that the city clerk appoints the clerks of the municipal court selected from an approved classified list of the civil service. (App. 2). He is not appointed by the chief-of-police. He is not a sworn police officer, does not have powers of arrest, does not wear a badge or police uniform, does not carry a gun and obviously does not prosecute cases.

The clerks of municipal court of the City of Tampa meet the constitutional mandate requiring a neutral and detached magistrate be placed between law enforcement and the public.

CONCLUSION II.

The judgment of the Supreme Court of Florida (A. -41) should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of March, 1972, a copy of the foregoing Brief for Appellee was mailed, postage prepaid, to Malory B. Frier, Esquire, 1809 North Howard Avenue, Tampa, Florida 33607, Counsel for Appellant, and to Daniel A. Rezneck, Esquire, of Arnold & Porter, 1229 Nineteenth Street, N.W., Washington, D. C. 20036, of Counsel for Appellant. I further certify that all parties required to be served have been served.

WM. REECE SMITH, JR.
City Attorney
GERALD H. BEE, JR.
Assistant City Attorney
Counsel for Appellee

APPENDIX

CONSTITUTIONAL PROVISIONS AND FLORIDA STATUTES INVOLVED

U. S. Constitution, Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Constitution, Amendment 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

1. Florida Statute (1967) Section 168.04, F.S.A., which reads as follows:

CLERK AND MARSHALL MAY TAKE AFFIDAVITS AND ISSUE WARRANTS

The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshall to have the accused person arrested and brought before the mayor for trial. The marshall may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaints and issue warrants for the arrest of persons complained against.

2. Section 495 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 17, Chapter 5363, Laws of Florida, 1903, which reads as follows:

> The Chief of Police, or any policeman of the City of Tampa may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person.

3. Section 160.1 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 1, Chapter 61-2915, Laws of Florida, 1961, which reads as follows:

> The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5445

GERALD SHADWICK,
Appellant,

v.

CITY OF TAMPA,
Appellee.

APPEAL FROM THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR THE APPELLANT

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REPLY BRIEF FOR THE APPELLANT

I.

Appellee misconceives Appellant's argument with respect to the affidavit supporting the arrest warrant in the present case. Appellee concedes, as it must, that "an affidavit which is conclusory such as here involved (A. 4) is not constitutionally sufficient" (Appellee's Brief, p. 6). Appellee, however, contends that the "issue regarding the conclusory affidavit" was not raised below. (*Id.*, p. 7).

Appellant does not rely on the insufficiency of the affidavit as an independent ground for the invalidity of the

Florida warrant procedure in this case. Throughout the proceedings in the Florida courts and in this Court, Appellant has challenged the constitutionality, on their face, of the Florida statutes which authorize clerks of the City of Tampa to issue arrest warrants. The issue is whether clerical personnel can be empowered to exercise this judicial function under the Fourth and Fourteenth Amendments.

The significance of the affidavit and warrant in the present case (App. 6-7) is that they vividly point up the danger implicit in the Florida procedure—that clerical personnel will simply "rubber stamp" the warrant applications of law enforcement officers. This Court has repeatedly warned against "rubber stamp" warrants and has emphasized that the Fourth and Fourteenth Amendments require the independent judgment of a judicial officer whether to issue a warrant. See, *e.g.*, *United States v. Ventresca*, 380 U.S. 102, 109 (1965); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); *Camara v. Municipal Court*, 387 U.S. 523, 541 (1967).

Examination will show that the arrest warrant signed and issued by the deputy clerk in the present case is literally a carbon copy of the affidavit sworn to by a police officer; the affidavit, in turn, is a printed form, containing the rubberstamped conclusion of the officer that a law has been violated. Our point, however, would be the same, even if the affidavit complied with this Court's teaching in *Giordenello v. United States*, 357 U.S. 480 (1958), and subsequent cases. The Florida procedure is constitutionally flawed because it reduces the judicial function of issuing arrest warrants to a ministerial act performed by clerical personnel.

II.

Appellee's principal reliance is on this Court's *dictum* many years ago in *Ocampo v. United States*, 234 U.S. 91, 100 (1914), that:

> "the function of determining that probable cause exists for the arrest of a person accused is only *quasi*-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal."

Ocampo, however, is not controlling in the present case for a number of reasons:

1. *Ocampo* did not involve or validate the issuance of arrest warrants by clerical personnel. The arrest warrants in *Ocampo* were in fact issued by a judge. 234 U.S. at 93.

2. No Fourth Amendment issue was raised or decided in *Ocampo*. The statement relied on by Appellee was not in response to a Fourth Amendment claim. The claims in *Ocampo* were not based on the United States Constitution, but on the orders of the Military Governor of the Philippine Islands and the Philippines Bill, an Act of Congress. 234 U.S. at 93. This Court did not render any constitutional decision in *Ocampo*. 234 U.S. at 98. Its decisions with respect to the Philippine Islands and the Philippines Bill have never been authoritative as to the United States Constitution. *Green v. United States*, 335 U.S. 184, 197 (1957).

3. The principal claims in *Ocampo* were that prosecution of the defendants for criminal libel could not be initiated without a preliminary judicial examination to determine probable cause or an indictment by a grand jury. 234 U.S. at 93-95. *Ocampo* held that the prosecution could be initiated by information.

4. *Ocampo* is of doubtful relevance to any Fourth Amendment question. Insofar as the Court in *Ocampo* stated that a prosecutor may be given the function of determining probable cause for arrest (234 U.S. at 100-01), *Ocampo* has already been discarded. This Court held last year in *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971), that such a function may not constitutionally be confided to a prosecuting official.

5. The *Ocampo dictum* relied on by Appellee has also been outmoded by events. This Court's decisions in

Giordenello, *Aguilar*, and *Ventresca*, *supra*, make clear the judicial nature of the decision to issue an arrest warrant. If a law enforcement official's affidavit were entitled to "perfunctory approval," it would make little difference who was empowered to issue an arrest warrant. But *Giordenello* emphatically rejects any such notion. 357 U.S. at 487. This Court there emphasized the constitutional necessity for an independent judgment of the justification for an arrest and the "issues of subtlety and complexity" in the warrant decision. 357 U.S. at 483; 486-487. In *Jones v. United States*, 362 U.S. 257, 270-71 (1960), and other cases, this Court has identified still another factor—the strong preference for a meaningful warrant procedure as an aid to law enforcement, serving to validate police judgments in doubtful or marginal cases by interposing the evaluation of "an independent judicial officer." *Jones v. United States*, 362 U.S. at 270.

These decisions have transformed the law relating to issuance of warrants and have superseded the over-simplified approach of the *dictum* in *Ocampo*.[1]

III.

As we have indicated in our Brief (p. 7), this Court's recent decisions state that the determination whether to issue a warrant is to be made by a "judicial officer." Clerical personnel who lack independent status and qualifications to administer a warrant procedure are not "judicial officers" within the meaning of this Court's decisions.

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[1] The cases listed by Appellee at pp. 12-13 of its Brief cite *Ocampo* for a variety of propositions. With the exception of the present decision of the Florida Supreme Court, however, none relies on *Ocampo* for the proposition that the Fourth and Fourteenth Amendments permit clerical personnel to issue arrest warrants.

That the issuance of warrants is not a clerical but a judicial function, requiring a judicial officer with independent status and qualifications for the task, was recently recognized by Congress when it enacted the Federal Magistrates Act of 1968, 82 Stat. 1107. The background and provisions of that Act are instructive and relevant to the issue in the present case. Although we do not contend that the Fourth and Fourteenth Amendments mandate imposition of the particular provisions of the Federal Magistrates Act on the States, the Act embodies certain principles fundamental to the administration of a warrant procedure. In effect, Congress defined the characteristics of the "neutral and detached magistrate" required by the Fourth Amendment. The Act identifies the kinds of safeguards and qualifications necessary to assure the independence and competency of these judicial officers. Comparison of the Florida procedure with the Act helps to demonstrate that Florida has fallen far below the minimum standards for a constitutionally permissible warrant procedure.

The Federal Magistrates Act grew out of an extensive study of the U.S. Commissioner System lasting several years. See S. Rep. No. 371, 90th Cong., 1st Sess., p. 9. The Congressional committees solicited the views of every Federal judge, U.S. Attorney, U.S. Commissioner, and numerous bar associations and members of the bar. The Act therefore represents a consensus of an extraordinarily broad spectrum of informed legal opinion. It received the formal endorsement of the Judicial Conference of the United States and the American Bar Association. *Id.*

One of the "most notable" of the "many substantial defects" which both the Senate and House Judiciary Committees found in the U.S. Commissioner system was that:

> "Commissioners in many districts grant search and arrest warrant applications perfunctorily, thereby depriving both the accused and the legal system of an independent determination of the question of probable cause." S. Rep. No. 371, 90th Cong., 1st

Sess., p. 10; H. Rep. No. 1629, 90th Cong., 2d Sess., p. 13.[2]

Congress enacted comprehensive provisions designed to assure that the new U.S. Magistrates would have both independence and qualifications for performance of their functions. Thus U.S. Magistrates are appointed by the judges of the District Courts and are responsible solely to the courts they serve. (28 U.S.C. §631(a)) They have a guaranteed tenure of office—8 years for a full-time Magistrate and 4 years for a part-time Magistrate. (28 U.S.C. §631(e))[3] A Magistrate can be removed during his term of office only for specified cause; removal must be voted by a majority of the judges of the District Court which appointed him or of the judicial council of the circuit; and removal may not occur without specification of the charges and opportunity for hearing. (28 U.S.C. §632(h)) Congress believed that "the term and tenure provisions of the act will assure both judicial independence and facilitate the appointment of the most qualified individuals." S. Rep. No. 371, 90th Cong., 1st Sess., p. 16.

Furthermore, the Act is explicit that Magistrates are judicial officers exercising judicial functions. (28 U.S.C. § 632)[4] They are deemed to be officers in the judicial

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[2]The hearings before the Senate and House Committees disclosed that warrant applications in many instances were being "handled on a mass production basis," and the issuance of a warrant was often "little more than a rubber stamp" of the application. See Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee on S. 3475, 89th Cong., 2d Sess., 1966, and on S. 945, 90th Cong., 1st Sess., 1967, pp. 7, 9, 238-39, 472-474, 561, 651 (hereinafter "Senate Hearings").

[3]The salary of a full-time Magistrate cannot be reduced during his term below that fixed at its beginning. (28 U.S.C. §634(b))

[4]Witnesses repeatedly pointed out the "judicial nature" of the functions of the Commissioners, including issuance of warrants. See, *e.g.*, Senate Hearings, pp. 14, 25-26, 238-39; Hearings before Subcommittee No. 4 of the House Judiciary Committee, 90th Cong., 2d Sess.,

branch of the Government. (28 U.S.C. § 634(c)) They take the same oath as federal judges. (28 U.S.C. § 631(f)) The appointing court must make the specific determination that a magistrate is "competent to perform the duties of the office." (28 U.S.C. § 631(b)(2)) No individual may be appointed as a full-time Magistrate unless he is a member of the bar. (28 U.S.C. § 631 (b)(1)) Even a part-time Magistrate must be a lawyer, unless both the appointing court and the Judicial Conference of the United States find that no qualified lawyer is available to serve at a specific location. (28 U.S.C. § 631 (b)(1)) Congress determined that "wherever possible, U.S. magistrates must be qualified attorneys." S. Rep. No. 371, 90th Cong., 1st Sess., p. 14.[5]

Finally, Congress attached importance to the continued legal training of Magistrates, as an additional guarantee of their competency to carry out their functions. The Federal

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on the Federal Magistrates Act, 1968, pp. 69, 92, 159. The report of the Judicial Conference of the United States likewise stressed that the Commissioners exercised "judicial power." *Id.*, p. 148.

[5]The framers of the Act were also cognizant of the problems created by the issuance of warrants by clerical personnel; a number of the Commissioners were clerks or deputy clerks of District Courts. S. Rep. No. 371, 90th Cong., lst Sess., p. 15. Congress heard testimony in the Hearings expressing doubt "whether most deputy clerks possess the legal expertise or the independence of judgment required to determine when an arrest warrant should be issued under the standards reflected in the decisions of the Supreme Court. . . . The exercise of such judicial discretion should be entrusted to a magistrate and not a clerk." Hearings on the U.S. Commissioner System, Subcommittee on Improvements in Judicial Machinery, Senate Judiciary Committee, 89th Cong., 2d Sess., 1966, p. 268; see also *id.*, pp. 274, 277, 281.

As a result Congress provided that a clerk or deputy clerk of a federal court could be appointed only as a part-time Magistrate and only with the approval of the Judicial Conference. (28 U.S.C. § 631(c) Such appointees must also meet all other prescribed qualifications and requirements for Magistrates, including bar membership, and they have the same protections as to tenure of office and removal as other Magistrates. See S. Rep. No. 371, 90th Cong., 1st Sess., p. 15.

Judicial Center is directed to conduct an introductory training program for new Magistrates, within a year after initial appointment, and thereafter to conduct periodic training programs and seminars for both full-time and part-time Magistrates. (28 U.S.C. § 637) See H. Rep. No. 1629, 90th Cong., 2d Sess., p. 19.

Florida, on the other hand, has provided none of these hallmarks of independence and qualifications for office in the statutes presently before this Court. The position of court clerk does not possess the characteristics of an independent judicial office.

The appointing authority for the deputy clerks who are empowered to issue warrants is the city clerk, with the approval of the mayor—executive officials. (Section 160.1 of the Charter of the City of Tampa, Section 1, Chapter 61-2915, Laws of Florida, 1961) The deputy clerks themselves are members of the city civil service, not the judicial branch. (*Id.*) There is no statutorily specified tenure in office as a clerk of the municipal court. There are no statutorily prescribed qualifications for designation as municipal court clerk, nor any required determination of special competency to perform the functions of the office. There is no requirement of bar membership or provision for legal training of court clerks to enable them to carry out their duties.

We do not contend that either the full panoply or any particular combination of these protections and qualifications is necessary to meet constitutional standards. We submit, however, that a court clerk who lacks all these indicia of an independent judicial officer cannot discharge the duty prescribed by the Fourth and Fourteenth Amendments, however "conscientious and impartial" he may be as an individual. See *State v. Paulick*, 277 Minn. 40, 151 N.W. 2d 591, 598 (1967). As the Supreme Court of Minnesota there held:

> "the grave consequences to the accused resulting from a wrongful arrest far outweigh the potential harm to

the community in requiring something more than the peremptory issuance of a warrant by a clerk untrained in the law. The harm to an accused arrested in his home or at his place of work, the humiliation and embarassment to his family, and the fact he has a record of arrest, however unjust, are consequences difficult to measure." 277 Minn. 40, 151 N.W. 2d at 597.

Respectfully submitted,

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SHADWICK v. CITY OF TAMPA

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 71-5445. Argued April 10, 1972—Decided June 19, 1972

City charter provision authorizing municipal court clerks to issue arrest warrants for breach of municipal ordinances *held* to comport with requirements of the Fourth Amendment that warrants be issued by a neutral and detached magistrate who must be capable of determining whether probable cause exists for issuance of the warrant. The clerks, though laymen, worked within the judicial branch under supervision of municipal court judges and were qualified to make the determination whether there is probable cause to believe that a municipal code violation has occurred. Pp. 347–354.

250 So. 2d 4, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Daniel A. Rezneck argued the cause for appellant. With him on the briefs was *Malory B. Frier.*

Gerald H. Bee, Jr., argued the cause for appellee. With him on the brief was *William Reece Smith, Jr.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The charter of Tampa, Florida, authorizes the issuance of certain arrest warrants by clerks of the Tampa Municipal Court.[1] The sole question in this case is whether

[1] The relevant Florida statute and Tampa charter provisions are set forth below.

1. Section 168.04 of Fla. Stat. (1965) reads as follows:

"The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, ad-

these clerks qualify as neutral and detached magistrates for purposes of the Fourth Amendment. We hold that they do.

Appellant was arrested for impaired driving on a warrant issued by a clerk of the municipal court. He moved the court to quash the warrant on the ground that it was issued by a nonjudicial officer in violation of the Fourth and Fourteenth Amendments. When the motion was denied, he initiated proceedings in the Florida courts by means of that State's writ of common-law certiorari. The state proceedings culminated in the holding of the Florida Supreme Court that "[t]he clerk and deputy clerks of the municipal court of the City of Tampa are neutral and detached 'magistrates' . . . for the purpose of issuing arrest warrants within the requirements of

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minister oaths to affidavits of complaints and issue warrants for the arrest of persons complained against."

2. Section 495 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 17, Chapter 5363, Laws of Florida 1903, reads as follows:

"The Chief of Police, or any policeman of the City of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person."

3. Section 160 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 1, Chapter 61-2915, Laws of Florida 1961, reads as follows:

"The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court."

the United States Constitution . . . ." 250 So. 2d 4, 5 (1971). We noted probable jurisdiction, 404 U. S. 1014 (1972).

I

A clerk of the municipal court is appointed by the city clerk from a classified list of civil servants and assigned to work in the municipal court. The statute does not specify the qualifications necessary for this job, but no law degree or special legal training is required. The clerk's duties are to receive traffic fines, prepare the court's dockets and records, fill out commitment papers and perform other routine clerical tasks. Apparently he may issue subpoenas. He may not, however, sit as a judge, and he may not issue a search warrant or even a felony or misdemeanor arrest warrant for violations of state laws. The only warrants he may issue are for the arrest of those charged with having breached municipal ordinances of the city of Tampa.[2]

Appellant, contending that the Fourth Amendment requires that warrants be issued by "judicial officers," argues that even this limited warrant authority is constitutionally invalid. He reasons that warrant applications of whatever nature cannot be assured the discerning, independent review compelled by the Fourth Amendment when the review is performed by less than a judicial officer.[3] It is less than clear, however, as to who would qualify as a "judicial officer" under appellant's theory. There is some suggestion in appellant's brief that a judicial officer must be a lawyer or the municipal court judge himself.[4] A more complete portrayal of appellant's position would be that the Tampa clerks are disqualified as judicial officers not merely because they are not lawyers

[2] Tr. of Oral Arg. 6, 7, 20, 21.

[3] Appellant's Brief 6; Tr. of Oral Arg. 10.

[4] Appellant's Brief 12–13; Reply Brief 8.

or judges, but because they lack the institutional independence associated with the judiciary in that they are members of the civil service, appointed by the city clerk, "an executive official," and enjoy no statutorily specified tenure in office.[5]

II

Past decisions of the Court have mentioned review by a "judicial officer" prior to issuance of a warrant, *Whiteley* v. *Warden*, 401 U. S. 560, 564 (1971); *Katz* v. *United States*, 389 U. S. 347, 356 (1967); *Wong Sun* v. *United States*, 371 U. S. 471, 481–482 (1963); *Jones* v. *United States*, 362 U. S. 257, 270 (1960); *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). In some cases the term "judicial officer" appears to have been used interchangeably with that of "magistrate." *Katz* v. *United States*, *supra*, and *Johnson* v. *United States*, *supra*. In others, it was intended simply to underscore the now accepted fact that someone independent of the police and prosecution must determine probable cause. *Jones* v. *United States*, *supra*; *Wong Sun* v. *United States*, *supra*. The very term "judicial officer" implies, of course, some connection with the judicial branch. But it has never been held that only a lawyer or judge could grant a warrant, regardless of the court system or the type of warrant involved. In *Jones*, *supra*, at 270–271, the Court implied that United States Commissioners, many of whom were *not* lawyers or judges, were nonetheless "independent judicial officers."[6]

The Court frequently has employed the term "magistrate" to denote those who may issue warrants. *Coolidge* v. *New Hampshire*, 403 U. S. 443, 449–453 (1971); *Whiteley* v. *Warden*, *supra*, at 566; *Katz* v. *United States*, *supra*, at 356–357; *United States* v. *Ventresca*, 380 U. S. 102, 108

[5] Reply Brief 8; Tr. of Oral Arg. 10–12.

[6] The United States Commissioner system has, of course, been replaced by the Federal Magistrates Act of 1968, 82 Stat. 1107.

(1965); *Giordenello* v. *United States*, 357 U. S. 480, 486 (1958); *Johnson* v. *United States*, *supra*, at 13–14; *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932). Historically, a magistrate has been defined broadly as "a public civil officer, possessing such power, legislative, executive or judicial, as the government appointing him may ordain," *Compton* v. *Alabama*, 214 U. S. 1, 7 (1909), or, in a narrower sense "an inferior judical officer, such as a justice of the peace." *Ibid.* More recent definitions have not much changed.[7]

An examination of the Court's decisions reveals that the terms "magistrate" and "judicial officer" have been used interchangeably. Little attempt was made to define either term, to distinguish the one from the other, or to advance one as the definitive Fourth Amendment requirement. We find no commandment in either term, however, that all warrant authority must reside exclusively in a lawyer or judge. Such a requirement would have been incongruous when even within the federal system warrants were until recently widely issued by nonlawyers.[8]

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[7] In *Compton*, a notary public was deemed a "magistrate," but the Court has nowhere indicated that the term denotes solely a lawyer or judge.

Webster's Dictionary (2d ed. 1957), defines magistrate as "[a] person clothed with power as a public civil officer; a public civil officer invested with executive or judicial powers . . ." or, more narrowly, "[a] magistrate of a class having summary, often criminal, jurisdiction, as a justice of the peace, or one of certain officials having a similar jurisdiction . . ." Random House Dictionary (1966) defines magistrate as (1) "a civil officer charged with the administration of the law" and (2) "a minor judicial officer, as a justice of the peace or a police justice, having jurisdiction to try minor criminal cases and to conduct preliminary examinations of persons charged with serious crimes."

[8] United States Commissioners were not required to be lawyers until passage of the Federal Magistrates Act of 1968. Even under this Act, a limited exception to lawyer's status is afforded part-time magistrates. 28 U. S. C. § 631 (b)(1).

To attempt to extract further significance from the above terminology would be both unnecessary and futile. The substance of the Constitution's warrant requirements does not turn on the labeling of the issuing party. The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause be drawn by "a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, *supra*, at 14; *Giordenello* v. *United States*, *supra*, at 486. In *Coolidge* v. *New Hampshire*, *supra*, the Court last Term voided a search warrant issued by the state attorney general "who was actively in charge of the investigation and later was to be chief prosecutor at the trial." *Id.*, at 450. If, on the other hand, detachment and capacity do conjoin, the magistrate has satisfied the Fourth Amendment's purpose.

III

The requisite detachment is present in the case at hand. Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality, or affiliation of these clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would distort the independent judgment

the Fourth Amendment requires. Appellant himself expressly refused to allege anything to that effect.[9] The municipal court clerk is assigned not to the police or prosecutor but to the municipal court judge for whom he does much of his work. In this sense, he may well be termed a "judicial officer." While a statutorily specified term of office and appointment by someone other than "an executive authority" might be desirable, the absence of such features is hardly disqualifying. Judges themselves take office under differing circumstances. Some are appointed, but many are elected by legislative bodies or by the people. Many enjoy but limited terms and are subject to re-appointment or re-election. Most depend for their salary level upon the legislative branch. We will not elevate requirements for the independence of a municipal clerk to a level higher than that prevailing with respect to many judges. The clerk's neutrality has not been impeached: he is removed from prosecutor or police and works within the judicial branch subject to the supervision of the municipal court judge.

Appellant likewise has failed to demonstrate that these clerks lack capacity to determine probable cause. The clerk's authority extends only to the issuance of arrest warrants for breach of municipal ordinances. We presume from the nature of the clerk's position that he would be able to deduce from the facts on an affidavit before him whether there was probable cause to believe a citizen guilty of impaired driving, breach of peace, drunkenness, trespass, or the multiple other common offenses covered by a municipal code. There has been no showing that this is too difficult a task for a clerk to accomplish. Our legal system has long entrusted non-

[9] Tr. of Oral Arg. 10.

lawyers to evaluate more complex and significant factual data than that in the case at hand. Grand juries daily determine probable cause prior to rendering indictments, and trial juries assess whether guilt is proved beyond a reasonable doubt. The significance and responsibility of these lay judgments betrays any belief that the Tampa clerks could not determine probable cause for arrest.

We decide today only that clerks of the municipal court may constitutionally issue the warrants in question. We have not considered whether the actual issuance was based upon an adequate showing of probable cause. *Aguilar* v. *Texas*, 378 U. S. 108 (1964). Appellant did not submit this question to the courts below, 237 So. 2d 231 (1970), 250 So. 2d 4 (1971), and we will not decide it here initially. The single question is whether power has been lawfully vested, not whether it has been constitutionally exercised.

Nor need we determine whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch. Many persons may not qualify as the kind of "public civil officers" we have come to associate with the term "magistrate." Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations. Here, however, the clerk is an employee of the judicial branch of the city of Tampa, disassociated from the role of law enforcement. On the record in this case, the independent status of the clerk cannot be questioned.

What we do reject today is any *per se* invalidation of a state or local warrant system on the ground that the issuing magistrate is not a lawyer or judge. Communities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judges or lawyers.[10] Many municipal courts face

[10] Some communities, such as those in rural or sparsely settled

stiff and unrelenting caseloads.[11] A judge pressured with the docket before him may give warrant applications more brisk and summary treatment than would a clerk. All this is not to imply that a judge or lawyer would not normally provide the most desirable review of warrant requests. But our federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activities [12] one

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areas, may have a shortage of available lawyers and judges and must entrust responsibility for issuing warrants to other qualified persons. The Federal Magistrates Act, for example, explicitly makes provision for nonlawyers to be appointed in those communities where members of the bar are not available. 28 U. S. C. § 631 (b)(1).

[11] See generally C. Whitebread ed., Mass Production Justice and the Constitutional Ideal (1970).

[12] States differ significantly as to whom they entrust the authority to grant a warrant. See *Burke* v. *Superior Court*, 3 Ariz. App. 576, 579, 416 P. 2d 997, 1000 (1966); *Parks* v. *Superior Court*, 236 P. 2d 874, 882 (Ct. App. Cal. 1951); *Kennedy* v. *Walker*, 135 Conn. 262, 272, 63 A. 2d 589, 594 (1948); *Grano* v. *State*, — Del. —, —, 257 A. 2d 768, 773–774 (1969); *Shadwick* v. *City of Tampa*, 250 So. 2d 4 (Fla. 1971); *State* v. *Swafford*, 250 Ind. 541, 546, 237 N. E. 2d 580, 584 (1968); *State ex rel. French* v. *Hendricks Superior Court*, 252 Ind. 213, 247 N. E. 2d 519 (1969); *Bailey* v. *Hudspeth*, 164 Kan. 600, 606, 191 P. 2d 894, 898 (1948); *State* v. *Guidry*, 247 La. 631, 635–636, 173 So. 2d 192, 194 (1965); *Wampler* v. *Warden of Maryland Penitentiary*, 231 Md. 639, 648, 191 A. 2d 594, 600 (1963); *LaChapelle* v. *United Shoe Machinery Corp.*, 318 Mass. 166, 168–170, 61 N. E. 2d 8, 10 (1945); *State* v. *Paulick*, 277 Minn. 140, 151 N. W. 2d 591 (1967); *People* v. *Richter*, 206 Misc. 304, 306–307, 133 N. Y. S. 2d 685, 688 (1954); *State* v. *Furmage*, 250 N. C. 616, 625–626, 109 S. E. 2d 563, 570 (1959); *Moseley* v. *Welch*, 218 S. C. 242, 250, 62 S. E. 2d 313, 317 (1950); *State* v. *Jefferson*, 79 Wash. 2d 345, 348–349, 485 P. 2d 77, 79 (1971); *State ex rel. Sahley* v. *Thompson*, 151 W. Va. 336, 342–343, 151 S. E. 2d 870, 873 (1966); *State ex rel. White* v. *Simpson*, 28 Wis. 2d 590, 137 N. W. 2d 391 (1965); *State* v. *Van Brocklin*, 194 Wis. 441, 217 N. W. 277 (1927).

key to national innovation and vitality.[13] States are entitled to some flexibility and leeway in their designation of magistrates, so long as all are neutral and detached and capable of the probable-cause determination required of them.

We affirm the judgment of the Florida Supreme Court.

[13] Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A. B. A. J. 943, 944 (1963).